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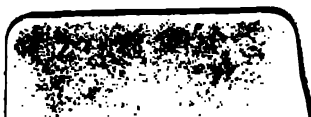
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

AND

UPON WRITS OF ERROR FROM THAT COURT

TO THE

Exchequer Chamber,

AND IN

THE BAIL COURT,

WITH

A TABLE OF THE NAMES OF CASES

AND

A DIGEST OF THE PRINCIPAL MATTERS.

BY

S. B. HARRISON AND F. L. WOLLASTON, Esqrs.
OF THE MIDDLE TEMPLE,
BARRISTERS AT LAW.

VOL. II.

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During the Period of these Reports.



The Right Hon. THOMAS Lord DENMAN, C. J.
The Hon. Sir JOSEPH LITTLEDALE, Knt.
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN WILLIAMS, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.



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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term, 1836.

REGULÆ GENERALES.

EXAMINATION OF ATTORNEYS.

REGULATIONS approved by the Judges in *Easter Term*, 1836, for the examination of persons applying to be admitted as Attorneys of the Courts of *King's Bench*, *Common Pleas*, or *Exchequer*, pursuant to the Rule of Court made in *Hilary Term*, 1836.

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Whereas, by a Rule of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, made in *Hilary Term*, 1836, it was ordered, that the several Masters and Prothonotaries for the time being of the said Courts respectively, together with twelve Attorneys or Solicitors, should be appointed, by a Rule of Court in *Easter Term* in every year, to be examiners, for one year, of persons applying to be admitted Attorneys of the said Courts, any five of whom (one whereof to be one of the said Masters or Prothonotaries) should be competent to conduct the examination; and that from and after the last day of the present *Easter Term*, subject to such appeal as thereafter mentioned, no person should be admitted to be sworn an Attorney of any of the said Courts, except on production of a certificate signed by the major part of such examiners actually present at, and conducting his examination, testifying his fitness and capacity to act as an Attorney, such certificate to be in force only to the end of the term next following the date thereof, unless such time should be specially extended by the order of a judge. And it was further ordered, that the examiners so to be appointed should conduct the said examination, under regulations to be first submitted to and approved by the Judges; and that until further order, such examinations should be held in the hall or building of the Incorporated Law Society of the United Kingdom, in *Chancery Lane*, on such days (being within the last ten days of every Term) as the said examiners, or any five of them, should appoint; and that any person not previously admitted of any of the three Courts, and

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desirous of being admitted, should give a term's notice of his intention to apply for examination, by leaving the same with the Secretary of the Society at their said hall. And whereas, by a Rule of all the said Courts, made in this present *Easter Term*, it was ordered, that the several Masters and Prothonotaries for the time being of the said Courts respectively, together with *Thomas Adlington, Jonathan Brundrett, George Frere, James William Freshfield, James Hall, Bryan Holme, William Low, Edward Rowland Pickering, Samuel White Sweet, William Tooke, Richard White, and Edward Archer Wilde*, gentlemen, Attorneys, should be, and the same were thereby appointed examiners for one year then next ensuing, to examine all such persons as should desire to be admitted Attorneys of all or either of the said Courts, from and after the last day of that term; and that any five of the said examiners, one of them being one of the said Masters or Prothonotaries, should be competent to conduct the said examination, in pursuance of, and subject to the provisions of the said rule in *Hilary Term* last.

In pursuance of the said Rules the following regulations, for conducting the said examinations, have been submitted to, and approved by the Judges of the said Courts:—

1. That every person applying to be admitted an Attorney of any of the said Courts, pursuant to the said Rules, shall, within the first seven days of the term in which he is desirous of being admitted, leave or cause to be left with the Secretary of the said Incorporated Law Society, his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the Attorney or Attorneys with whom he shall have served his clerkship.

2. That in case the applicant shall show sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

3. That every person applying for admission shall also, if required, sign, and leave or cause to be left with the Secretary of the said Society, answers in writing to such other written or printed questions as shall be proposed by the said examiners, touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanation touching the same; and shall also, if required, procure the Attorney or Attorneys with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any question touching such service or conduct, or shall make proof, to the satisfaction of the said examiners, of his inability to procure the same.

4. That every person so applying shall also attend the said examiners, at the Hall of the said Society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as an Attorney.

5. That upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said exami-

nation (one of them being one of the said Masters or Prothonotaries) shall be satisfied as to the fitness and capacity of the person so applying to act as an Attorney; the said examiners present, or the major part of them, shall certify the same under their hands, in the following form, viz. :—

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In pursuance of the Rules made in *Hilary* and *Easter* Terms, 1836, of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, we, being the major part of the examiners actually present at and conducting the examination of *A. B.*, of, &c., do hereby certify, that we have examined the said *A. B.* as required by the said rules, and we do testify that the said *A. B.* is fit and capable to act as an Attorney of the said Courts.

(The above Rule is signed by all the Judges.)

Questions as to due Service, to be answered by the Clerk.

1. What was your age on the day of the date of your articles?
2. Have you served the whole term of your articles at the office where the Attorney or Attorneys to whom you were articulated or assigned carry on his or their business, and if not, state the reason?
3. Have you, at any time during the term of your articles, been absent without the permission of the Attorney or Attorneys to whom you were articulated or assigned, and if so, state the length and occasions of such absence?
4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the Attorney or Attorneys to whom you were articulated or assigned?
5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an Attorney or Solicitor?

Questions as to due Service, to be answered by the Attorneys.

1. Has *A. B.* served the whole term of his articles at the office where you carry on your business, and if not, state the reason?
2. Has the said *A. B.*, at any time during the term of his articles, been absent without your permission, and if so, state the length and occasions of such absence.
3. Has the said *A. B.*, during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articulated clerk?
4. Has the said *A. B.*, during the whole term of his clerkship, with the exceptions above-mentioned, been faithfully and diligently employed in your professional business of an Attorney or Solicitor?
5. Has the said *A. B.*, since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an Attorney and Solicitor?

And I do hereby certify that the said *A. B.* hath duly and faithfully served

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under his articles of clerkship, (or assignment, as the case may be,) bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted an Attorney.

The following notice has been posted up in the Common Law Courts, and at the Judges' Chambers, and all the Law Offices :—

Examination of Attorneys under the Rules of Hilary and Easter Terms, 1836.

The articles of clerkship, and answers to questions touching the due service and good conduct of persons applying to be admitted Attorneys, are to be left with the Secretary of the Incorporated Law Society, at the Hall in *Chancery Lane*, within the first seven days of Term, (viz. between the 23rd and 30th *May*, inclusive).

The first examination will take place at the Hall of the Incorporated Law Society, on *Saturday* the 4th of *June*, and commence at ten o'clock in the forenoon. The applicants are required to attend in the Hall, at half-past nine, on the day of examination.

Applications for further information may be made to the Secretary.

17th *May*, 1836.

E. Maugham.

The KING *v.* The Inhabitants of OLDLAND.

1. A pauper met with an accident in the parish in which he was residing, but in which he was not settled :—*Held*, that he was a person coming to settle in that parish, within the 13 & 14 *Car. 2*, and removable; and that the accident was an infirmity, within the 35 *Geo. 3*, c. 101, which gave power to justices to make an order of suspension, and charge the parish in which he was settled with the expenses.

2. A pauper, under such circumstances, could not be considered as casual poor.

ORDER for the removal of *Samuel Vox*, his wife and children, from *Monythusloyn* to *Oldland*. On appeal the sessions confirmed the order, subject to a case, in which it was stated, that some considerable time before the happening of the accident thereafter mentioned, the pauper, *Samuel Vox*, being then settled in the hamlet of *Oldland*, resided in the parish of *Monythusloyn* for the purpose of his employment, and continued so to reside up to the time of the making of the order appealed against. During his residence in *Monythusloyn*, he was employed in a colliery there, and in the course of that employment he, on the 29th day of *May*, 1832, met with an accident, by which his thigh bone was broken. The pauper was thereupon carried to the nearest and most convenient dwelling-house in the same parish of *Monythusloyn*; a surgeon was sent for by the parish officers of that parish, and the expenses of 10*l.* 2*s.* 6*d.* were afterwards, and by reason of the accident, incurred by the parish officers in his cure and maintenance. The pauper had not been chargeable to the parish of *Monythusloyn* up to the time of the accident, but the surgeon had been employed by the parish officers to attend the pauper in consequence of the accident, before the order of removal was made. On the 30th of *May*, 1832, the pauper then being, by reason of the accident, incapable of being removed, or of being brought before any justice of the peace for the purpose of being removed, without endangering his life, his examination was duly taken, and thereupon the order in question, for the removal of the pauper from the parish of *Mony-*

thusloyn to the hamlet of *Oldland*, was made by two justices of the peace in and for the county of *Monmouth*, and immediately suspended, by an order of suspension indorsed thereon by the said justices. On the 31st of *October* following, the pauper being in a fit state to be removed, the same justices took off the suspension, and made an order for the payment by the appellants of the sum of 10*l* 2*s*. 6*d*. for the expenses so incurred under the suspension of the order. The question for the opinion of the Court was, whether, at the time the order of removal was made, the pauper was removable from the parish of *Monythusloyn*, so as to charge the appellants with the costs so incurred under the suspension of the order.

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Greaves, in support of the order of sessions.—Under the 13 & 14 *Car.* 2, c. 12, the parish officers had power to remove persons who were likely to become chargeable. The 35 *Geo.* 3, c. 101, s. 2,—passed to remove certain inconveniences arising from that state of the law—repealed the former statute, and enacted, that no person should be removable unless he was actually chargeable. (He was stopped.)

The *Attorney-General* and *Nicholl*, *contrà*.—The pauper was irremovable in consequence of the state he was in, arising from the accident; the order was, therefore, void.—[*Patteson*, J.—The question is, whether a man who is an inhabitant of a parish, can be in any case casual poor in that parish. It seems to me that a man cannot, under any circumstances, be casual poor in the place where he resides.]—In case of an accident occurring to a pauper in any particular parish, that parish is bound to relieve and take care of him, and cannot, by means of an action, obtain repayment of the expense incurred from another parish in which the pauper is settled, if that should happen to be the case. This is the case even where notice may have been given to the officers of that parish. *Atkins v. Banwell* (a), *Lamb v. Bunce* (b). Even if the officers of the parish in which the accident happens neglect their duty in this respect, any individual parishioner may take care of the pauper, and recover the expenses from them. *Tomlinson v. Bentall* (c), *Gent v. Tomkins* (d), *Simmons v. Wilmott* (e). This was the state of the law before the passing of the 35 *Geo.* 3, c. 101; and that statute has made no difference, because it does not apply to cases like this, where, by reason of accident, the removal of the pauper is absolutely impossible. In *Rex v. Bury St. Edmunds* (f) it was held, that the expenses of relief given to a pauper, who had met with an accident in a parish in which he was not settled, could not be recovered, during the suspension of an order of removal obtained by the parish in which the accident happened.—[*Patteson*, J.—That case turns entirely on the ground, that the pauper was not a person who had come to settle.]—Then in *Rex v. St. Lawrence, Ludlow* (g), it was even held, that a pauper, under circumstances like the present, was irremovable from a third parish, into which he had been carried for the purpose of being cured, from the parish in which the accident happened. All these cases show that the

(a) 2 East, 505.

(b) 4 Maule & Selw. 275.

(c) 5 Barn. & Cress. 738.

(d) 1 Dowl. & Ryl. 4.

(e) 3 Esp. 91.

(f) 10 East, 25.

(g) 4 Barn. & Ald. 660.

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expenses were not recoverable by action, and if so, they are equally irrecoverable by the machinery of a suspended order of removal.

LORD DENMAN, C. J.—I cannot feel any doubt upon this case. The pauper was clearly a person who had come to settle in the parish, within the 13 & 14 *Car. 2*. Such a person, before the 35 *Geo. 3*, was removable, if likely to become chargeable; but by that statute he was only made removable when actually chargeable. There was danger that a pauper, who had become chargeable by reason of illness, might be removed too soon; power was therefore given to the justices to suspend the order of removal, if it should appear to them that the pauper was unable to travel by reason of sickness or other infirmity, or that it would be dangerous for him so to do. The expression "other infirmity," I take to mean any bodily infirmity whatever. Again, there might be danger that a person might be taken before the justices before he was in a fit state to be taken. Another act, the 49 *Geo. 3*, c. 124, therefore provides, that in such cases the justices might go to him. The proper course seems to have been taken in this case; and all that has been done appears to me to be quite right.

LITLEDALE, J.—I am entirely of the same opinion. It seems to me quite correct that the parish in which the pauper was settled should pay these expenses. I do not agree that an accident is not an infirmity, within the meaning of the statute. I think the word "infirmity" must of necessity include an accident.

PATTESON, J.—It seems to me that if we were to hold that this order is not good, we should be deciding in a manner quite contrary to the object of the 35 *Geo. 3*. It is undeniable that this pauper might have been removed, independent of the danger which would have been incurred to his life. He was an inhabitant who had come to settle, and had become chargeable; he was therefore removable, if it could be done without danger of life. Now this is the very case provided for by the words of the statute. It is the precise case which was in the contemplation of the legislature. It is said he was not chargeable, because the parish in which the accident happened was liable for the expenses. No doubt they would have been so, and the pauper would not have been removable if the accident had happened to him in a parish in which he was not resident. But why? Because, not having come to settle in the parish, he would have been merely casual poor, and within the cases which have been cited.

COLERIDGE, J.—The question to be decided is, whether, at the time the order was made, the pauper was removable so as to charge the parish in which he was settled with the expenses incurred by maintaining him during the time that the order was suspended. The first step is, was the man removable? If he was, then, although it might not be proper to carry the order of removal into effect, the justices might, if it had been necessary, have gone and examined the pauper as to his place of settlement, and made an order of removal. Then, although the order might have been made, it could not with any propriety have been carried into effect, on account of

the state in which the pauper was. The 35 Geo. 3, was passed for the very purpose of providing for this state of circumstances. That statute gives power to the justices to suspend the order; and charges the expenses of maintaining the pauper, subsequent to the time when the order was obtained, on the parish to which the pauper is removed. The next question, then, in this case, is, whether the order of suspension could properly be made? On that point I have no doubt whatever. This was a case exactly within the terms of the statute, where the pauper could not be removed without danger, in consequence of infirmity.

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Order confirmed.

The KING v. The Inhabitants of IGHTHAM.

ORDER for the removal of *John Webb* from *Sundridge* to *Ightham*. On appeal the sessions quashed the order, subject to the opinion of the Court on the following case:—The respondents proved a settlement by birth in the appellant parish. The appellants set up a subsequent settlement in the respondent parish, under the following circumstances:—*William Webb*, the brother of the pauper *John Webb*, worked with *Wm. Wright*, a carpenter residing at *Ightham*, for three years, under a verbal contract of apprenticeship; and in the year 1804, when the pauper was about twenty years old, applied to *Wright* to take the pauper in his place; to which *Wright* answered, "No, that he would take no more three years' apprentices, unless they would agree to work on his land as well as at the carpentry business. I will have no more apprentices for three years, unless he is agreeable to do other work as well; I will take him to do work as a servant." *Wright* occupied three or four acres of hop ground. *William Webb* assented to this; and it was agreed that the pauper should live with *Wright* for three years, to learn the business of a carpenter, and to do any other work he required him to do; and he was to be paid nine shillings a week for the first year, ten shillings a week for the second year, and eleven shillings a week for the third year. It was further agreed, that if the pauper did any over-work at any time, he was to be paid for it in addition to his rate of wages at the time; *Wright* added, that the pauper might have *Sunday* to himself, if he asked leave. The pauper entered *Wright's* service in pursuance of this agreement, and served the three years, boarding and lodging at his own expense, with a journeyman of *Wright's*.

A man who was a carpenter and occupier of land, was applied to by another to permit him to succeed a then apprentice he had. The master said, he would take no more apprentices unless they would work on the land as well as at the trade, and that he would take him to do work as a servant. It was agreed, that the pauper should live with the master for three years and learn the business of a carpenter, and do any other work he required him to do. The master was to pay weekly wages, and for over-work:—*Held*, that this was a defective contract of apprenticeship, and not a contract of hiring and service,

Bodkin and *Erskine Perry*, in support of the order of sessions.—It must be taken, that the sessions have found that this was a contract of hiring and service; and that finding is conclusive. In *Rex v. St. Andrew the Great, Cambridge (a)*, where it was a question, whether there was a hiring and service for a year in the appellant parish, the sessions confirmed the order of removal, subject to a case; and it was held, that this amounted to a finding by the sessions, that there was a hiring and service for a year; and that such a finding ought not to be disturbed, if there were any premises to warrant it. So in *Rex v. Great Wishford (b)* the Court laid it down, that where

(a) 8 Barn. & Cross. 664.

(b) 5 Nev. & Mann. 540.

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the Sessions state facts and draw a conclusion, the Court will not disturb the finding, unless it appear that the evidence was contrary to the finding, or that there was no evidence to support it.—[Lord Denman, C. J.—The Sessions here have stated all the facts, upon which we must give our opinion. This case differs from *Rex v. Great Wishford*, inasmuch as there the Sessions came to a conclusion of fact, whilst here the question is one entirely of law, and the Sessions have come to no conclusion at all. In *Rex v. King's Lynn* (a) the Sessions found that there was a contract of hiring and service, but stated facts upon which the Court thought they were wrong.]—Each case of this description must depend upon its own particular facts, as showing the object which the parties had at the time of entering into the contract which is the subject of discussion. In the present instance, the object of the master clearly was to engage a servant, and not to take an apprentice. *Rex v. Coombe* (b), and *Rex v. Edingale* (c), will be relied on by the other side, but they are clearly distinguishable. This case seems to be more like *Rex v. Hitcham* (d), in which the contract was held, under circumstances very like the present, to be a contract of hiring and service. *Rex v. Crediton* (e), and *Rex v. Newtown* (f), may also be referred to.

Deeds, contra, was stopped.

LORD DENMAN, C. J.—It does appear to me that this was an imperfect contract of apprenticeship. I think the primary intention was to teach the pauper the trade of a carpenter.

LITLEDALE, J., after stating the facts, said :—I think the taking as a servant was subsidiary to the main intention to take the pauper as an apprentice. It is not unusual for a master to agree to pay his apprentice; that circumstance, therefore, has no weight in showing that this was a contract of hiring and service. Upon the whole, although the statements certainly appear to be somewhat conflicting, I think that this must be taken to be an imperfect contract of apprenticeship.

PATTESON, J.—I also think this was an imperfect contract of apprenticeship.

COLERIDGE, J.—The Sessions ought to have found this case one way or the other. It ought not to have come here. I agree with the rest of the Court in thinking that this was a defective contract of apprenticeship.

Order of Sessions quashed.

(a) 6 Barn. & Cress. 97.
 (b) 8 Barn. & Cress. 82.
 (c) 10 Barn. & Cress. 739.

(d) Burr. S. C. 489.
 (e) 2 Barn. & Adol. 493.
 (f) 1 Adol. & Ellis, 238.

The KING v. The Churchwardens of DURSLEY.

RULE for a *mandamus* to the churchwardens of *Dursley* to make certain payments to *Charles Bruce Warner, Esq.*, or to raise by rate a sufficient sum for the purpose of doing so. The following facts appeared:—In 1824, 1825, and 1826, repairs had been done to the parish church to the amount of 1585*l.* 12*s.* 7½*d.* At a vestry held 20th *November*, 1831, it was resolved, that as 413*l.* 3*s.* 9½*d.*, part of that sum, remained unpaid, the sum of 63*l.* 3*s.* 9½*d.* should be raised and paid in part, and that the further sum of 350*l.* should be borrowed upon the credit of the church-rates, under the provisions of 59 *Geo.* 3, c. 134, s. 14, and that the churchwardens should apply to the bishop and the incumbent for their consent; and on application made, the bishop and incumbent did consent. On 27th *February*, 1832, the then churchwardens borrowed from *Mr. Warner* 350*l.*, and to secure the re-payment by instalments with interest, executed to him a deed of charge upon the church-rates then raised, or thereafter to be raised, in the parish. A bond was also executed by the then churchwardens, and seven other parishioners of *Dursley*, in the penal sum of 700*l.*, conditioned for the re-payment of the money borrowed on the terms of the deed. The instalments, together with all interest, were paid up to 27th *August*, 1834; applications were then made to the churchwardens for a rate to be made to enable them to pay the other instalments, but without effect. Several of the parishioners refused to pay any rate for the purpose, on the ground that it was made for the purpose of paying off a debt incurred in 1824 and 1825.

Churchwardens are only authorized by 59 *Geo.* 3, c. 134, to borrow money upon the credit of the church-rates, for the purpose of defraying the future expenses of repairs to the church: they have no authority to make a rate for the purpose of enabling them to repay money borrowed to pay the expenses incurred by by-gone repairs.

Thesiger and *Busby* showed cause.—No *mandamus* will go, because there is another and a better remedy, namely, an action on the bond. *Rex v. Severn and Wye Railway Company* (a) is the only case where it has been held that such a circumstance is not an answer to an application for a *mandamus*: but that case is distinguishable in many respects. Then again, the Court will not grant a *mandamus*, because, if the churchwardens acted in obedience to it, they would subject themselves to an action, by any attempt to enforce payment of any such rate as that sought to be laid. In *Rex v. Hall and Dyer* (b), the Court acted on that principle. It is clear that such a rate as that asked for would be illegal, and any attempt to enforce it would form the ground of an action. Churchwardens have no right to raise money for payment for the repairs of the church done many years before. They have only authority by the 59 *Geo.* 3, c. 134, s. 14, to raise money for prospective repairs; *Rex v. Churchwardens of St. Mary, Lambeth* (c).

R. V. Richards, contra.—The bond is only a collateral security, and therefore cannot affect the course of proceeding in the regular way by *mandamus*. The other objection, arising from the subjection of the churchwardens to an action by any attempt to enforce this rate, does not apply, because there does not exist a necessary ingredient in such an apprehension,—that it must be based on a reasonable ground. There is not any objection to the raising of

(a) 2 Barn. & Ald. 646.

(b) 2 Adol. & Ellis, 606.

(c) 3 Barn. & Ald. 651.

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money for the by-gone repairs of a church, as well as for prospective repairs; both are equally within the reason of the law, and the language of the statute.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day (6th May), delivered judgment.—This was an application for a *mandamus* to be directed to the churchwardens of *Dursley*, commanding them to make a rate, and take all necessary steps for the payment to *Charles Bruce Warner*, of the instalments remaining due on a sum of 350*l.*, which had been borrowed for the purpose of defraying the expenses of repairing the parish church, and charged upon the church-rates, under the authority of the 59 *Geo. 3*, c. 134, s. 14. It appeared, among other facts, that the repairs in question had been done in the years 1824, 1825, and 1826, at an expense of 1500*l.*: that in 1832, the sum of 350*l.* remaining unpaid, the applicant had been asked to lend that sum, and had done so, receiving a deed of charge, regular in form, and with the necessary consent of the bishop, incumbent, and vestry: one instalment of the principal and interest had been paid in 1833, and the interest to August, 1834. It was objected, on showing cause, that the section in question does not authorize the borrowing of money and charging the rates retrospectively. We have considered this objection, and although the words of the statute are in this respect general, we are of opinion that it must prevail. It is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made retrospectively. The payers being a fluctuating body, nothing, generally speaking, is more just or more likely to conduce to economy, than to hold that they who create a charge shall themselves bear it. The statute has to a certain extent modified the general rule, and the churchwardens are authorized, with the sanction of the vestry, bishop, and incumbent, to borrow, on the credit of the rates, such sum of money as shall be necessary for defraying the expense of repairing the church, and they are thereby empowered and required to raise by rate a sum sufficient, from time to time, to pay the interest, and not less than 10 per cent. of the principal, until the whole of the money so borrowed shall be repaid. It appears to us that all the provisions point clearly to the limits of departure from the general principle above stated. The consent of the incumbent and bishop appears to have been thought necessary, in order to see that the repairs should be of that onerous and permanent nature which might properly be thrown in part on the payers of succeeding years. Their consent, and that of the vestry, have the effect also of securing the parish from an improvident outlay; and finally, the provision that the principal and interest shall be paid in ten instalments, (which ought, in our opinion, to be annual,) secures the participation of the existing rate-payers in the discharge of the loan, and prevents it from becoming a burthen at any indefinite period on their successors. The obvious purposes of the Act, so necessary to prevent abuses of the power given by it, can only be secured by an adherence to the general rule stated above, in all particulars not specially provided for by the clause. We are therefore of opinion, that the rate now sought to be imposed would not be authorized by the statute, and of course that the present rule must be discharged.

Rule discharged.

STEEPLE V. BONSALE.

TRESPASS *quare clausum fregit*. *Pleas*: 1. A justification under a private right of way. 2. A justification of a public right of way. 3. A justification, that before the making of an order of justices, there ought to have been a public footway leading from the premises of the defendant over the *locus in quo*; and the same was ordered to be stopped up by an order of justices, which was appealed against, and upon appeal confirmed: that upon the confirmation of the order, and in order to induce the Court to confirm the order, the plaintiff did, by a consent in writing, consent and agree with the defendant, with the assent of the justices, that the defendant, whilst he should be the occupier of the premises, should have and use the way which before the making of the said order he had been accustomed to have and use, and of right ought to have had and used. *Replications*, taking issue upon the right of way in the two first pleas, and upon the agreement mentioned in the last. At the trial at the Spring Assizes at *Derby*, a verdict was found for the plaintiff; and the cause and all matters in difference were referred to an arbitrator upon the usual terms, who was to direct what was to be done in future. The arbitrator awarded as follows: "Whereas in the said action three issues were joined between the plaintiff and the defendant, one relative to a certain private way alleged to have been used for twenty years and upwards, and another relative to a certain public way, and another relative to a certain consent and agreement; now I do award a verdict for the defendant upon the issue relative to the consent and agreement, and for the plaintiff upon the other issues. If there had been no issue relative to the said consent and agreement, I should have awarded 1*s.* damages to the plaintiff upon the other issues. And I do further award, that the plaintiff do upon request, and at the expense of the defendant, execute, by a proper deed and conveyance, a grant to the defendant of such private right of way as is mentioned in the third plea of the defendant, being that way concerning which in the same plea it is alleged, that the plaintiff had agreed to and with the defendant, that the defendant, by and with the assent of the justices in that plea mentioned, should have and use it whilst he should be the occupier of certain premises in the third plea mentioned." A rule was obtained by the plaintiff for judgment *non obstante veredicto* on the third issue.

1. A cause in which there were three issues was referred to arbitration at *Nisi Prius*, on the usual terms. The arbitrator found two issues for the plaintiff, and one for the defendant, and said in his award, "that if there had been no issue relative to the consent, (the matter in issue on the one found for the defendant,) I should have awarded 1*s.* damages to the plaintiff upon the other issues:—*Held*, that the plaintiff was not entitled to move the Court for judgment *non obstante veredicto* on the issue found for the defendant.
2. Such an award is sufficiently final.

Kelly and *N. R. Clarke*, showed cause.—This motion cannot be supported, whatever may be the legal effect of the justification in the third plea. The verdict was taken, subject to a reference upon the usual terms; that reference has been gone into, and the matter has been finally settled by the arbitrator. Neither party, therefore, can make an application of this description again; in effect the application is equivalent to bringing a writ of error, which is prohibited by one of the usual terms on a reference; it may therefore be considered to be in violation of the terms of that stipulation. If the arbitrator has done wrong, the only course would be, an application to set aside the award.—[*Coleridge, J.*—How could this objection have been taken at all before the arbitrator, or how could he have disposed of it?—He

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might have entered a verdict for the plaintiff, and directed judgment for the defendant *non obstante*.—[*Littledale, J.*—How can we now give judgment for the plaintiff, when no damages have been found?—That is one of the numerous difficulties which occur, strongly showing the impropriety of meddling with the proceedings after the case has been settled by an arbitration. *Clement v. Lewis* (a) shows, that a writ of inquiry to assess the damages would be necessary, even if the rule were to be made absolute. If that be necessary the award cannot be final; and this course is an indirect method of setting aside the award. If this had been such an application directly made, the time has elapsed, and it is now too late. *Moseley v. Davis* (b) shows that there can be no arrest of judgment.

Sir *W. W. Follett* and *G. T. White*, in support of the rule, cited *In re Mackay* (c).

Cur. adv. vult.

Lord DENMAN, C. J. afterwards (9th *May*.) gave judgment.—This was a question of a right of way, and at the trial it was made the subject-matter of a reference to arbitration. The arbitrator, by his award, has found a verdict for the plaintiff on the two first issues, and a verdict for the defendant upon the issue relative to a consent to use the right of way; and he goes on to say,—“If there had been no issue relative to the consent and agreement, I should have awarded 1s. damages to the plaintiff on the other issues.” The arbitrator, therefore, seems to have considered the third plea as not a good plea; but he has not, on the face of his award, reserved any point. The application now made to the Court is for judgment on the third issue, *non obstante veredicto*. It however appears to us, that it is not open to the plaintiff to come and make this application. The arbitrator's power was complete, and his duty was to put a final end to the matter; he has done whatever the Court might have done, and his award is final, and an end of all proceedings.

Rule discharged.

(a) 3 *Brod. & Bing.* 297. (b) 11 *Price*, 162. (c) 2 *Adol. & Ellis*, 356.

LISTER v. LOBLEY and others.

The words
“owner or proprietor of land,”
used in a compensation clause in a local act of parliament, to indicate the persons to whom compensation is to be made for injuries arising out of the prosecution of the

act, have not necessarily any technical meaning confined to the owner of the inheritance, but must be construed with reference to the general object of the act; and may mean any person who has any estate or interest—as, for instance, a tenant—in the land, who sustains loss or damage.

TRESPASS for entering plaintiff's close and pulling down buildings.

Plea: that the defendants acted under the authority of the trustees of a certain turnpike road, made under a local act, (the 5 & 6 *Will. 4*, c. xxxvi.) by which they were authorized to take possession of land and buildings for the purposes of the road, upon making satisfaction to the owners and proprietors, and that they had made satisfaction, &c., wherefore they had a right to enter. *Replication*, taking issue thereon. At the trial at the last Assizes at *York*, before Lord Denman, C. J., it appeared that the plaintiff was the tenant of

the land and premises in question. A verdict was found for the plaintiff with nominal damages, subject to the opinion of the Court on the point, whether the plaintiff was to be considered the owner within the meaning of the local act.

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Cresswell now moved to set it aside, and enter a nonsuit, or to have a new trial. The authority of the defendants, under the local act, is admitted; and the first question raised is, whether the plaintiff was the owner of the land. The plaintiff was the tenant of the land, and the trustees having settled with the owner, have done enough to justify them in taking possession; it was his business to settle with the tenant. The 25th section of the local act, like the 83rd section of the 3 *Geo.* 4, c. 126, gives the trustees the right to enter upon lands or premises "making or tendering satisfaction to the owner or proprietor of such lands and premises for the use of the same, or for any loss or damage they may sustain thereby;" but in the local act the words are limited to "owners or proprietors," and do not include "persons interested therein," as the words of the General Turnpike Act do, so that the trustees, having made an agreement with the owner, the tenant must seek his remedy elsewhere. The second question therefore is, whether a tenant, having any right or claim of right against the trustees under a local turnpike act, must not resort to the General Turnpike Act to recover from them, instead of having recourse to this action of trespass. Now, the General Turnpike Act, 3 *Geo.* 4, c. 126, s. 83, allows trustees to turn persons out of possession, without being deemed trespassers. The remedy of the plaintiff, therefore, must be, not by this form of action, but by proceeding against the trustees under the General Turnpike Act, the provisions of which are declared by the 9 *Geo.* 4, c. 77, to be embodied in all local acts. The present action, consequently, cannot be supported, and a nonsuit must be entered.

Lord DENMAN, C. J.—This is a motion for a nonsuit, upon two grounds; first, that the trustees, having settled with the ultimate owner of the land, have done enough to satisfy the provisions of the local act of parliament; and secondly, that if the plaintiff had any claim for compensation, he must enforce it, not by an action of this sort, but by a proceeding under the General Turnpike Act. The first question raised on these points is, whether the plaintiff is the owner or proprietor of the land, within the meaning of the local act of parliament, so as to be entitled to satisfaction from the parties who have taken his land from him. It appears to me, that, for the purpose of receiving satisfaction for his land, he is an "owner or proprietor" within the meaning of the act: "owner and proprietor" are words not of any definite legal meaning; a man may be the owner after the lapse of a long term, or he may have a share or ownership in the term itself. It would be inconvenient and unjust to allow trustees of a road to make compensation to the owner of the fee-simple alone, and so to deprive the tenant of any satisfaction for damages from the loss of his land. Is it only in the character, strictly speaking, of owner or proprietor, that he can receive injury or be entitled to compensation? I think thus even upon the clause itself. But take the clause and the schedule annexed to and forming part of it, and then we find some words which furnish a strong argument on the other side; for in the schedule the words adopting the form of expression in 3 *Geo.* 4, c. 126, s. 83,

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are, "owner and proprietor, and other person interested." But I am not compelled to draw an argument from the use of these latter words in the schedule, for it seems to me, that within the clause itself, the words "owner and proprietor" are not satisfied, without including such tenants as are in one sense owners and proprietors of the land.

LITLEDALE, J.—The words of the act appear to me to embrace the present case. The words "owner or proprietor" are not legal terms, but are words of common parlance. A man is often said to be the owner, though his rights may vary according to circumstances. In an action for tithes, the common form of the declaration is, that the plaintiff is the proprietor of the tithes, and you satisfy that allegation by showing that he has a lease of them. Suppose that a man grants a lease of lands for 21 years, without reserving rent, who is the owner of the lands during the term? Certainly the person in possession. He would be called so in common parlance, and therefore the word "owner" which is used in that, may in this act mean any person having an interest in the land. The words "owner and proprietor" do not necessarily import that the person spoken of should be the possessor of the fee-simple, but refer to all such persons as may be injured, and will therefore have a right to compensation.

PATTESON, J.—In looking to this statute, and endeavouring to collect the meaning of the legislature, I cannot doubt that "owner and proprietor" here sufficiently include the plaintiff. The persons entitled to compensation are not merely entitled to it for the loss of the land itself, but also "for the use of the same, or for any loss or damage they may sustain thereby." The plain meaning of this is, to afford compensation to persons who suffer temporary damage from the acts of the trustees; and who are these persons likely to be but the tenants of the lands? I have never yet seen a local act of parliament on which discussions of this sort might not arise. Always, invariably, there are some dozen of contradictory enactments in them. We must endeavour to collect the meaning of the legislature from a consideration of the whole. The meaning of the legislature here is, that the damage sustained by the landlord or tenant shall be settled for. They may indeed settle with each other, as Mr. *Cresswell* has suggested, but here is no clause giving the tenant the right to maintain an action against his landlord in respect of any damage he may suffer, and he has no such right otherwise. The legislature did not mean to put him in the situation of suffering damage, and then to leave him without compensation. The compensation must be meant to be secured to any person who is interested, and who has suffered damage. *Reddendo singula singulis*, such must be the construction of the act.

COLERIDGE, J.—I have no doubt upon the first point. We must ascertain what is the intention of the legislature in the use of these words. We must consider that this is a local act of parliament, and is therefore to be construed strictly against the parties who take strong powers under it, and in favour of those who are likely to be injured by its provisions. What is the meaning of the words "owner or proprietor?" The words are used in a clause framed for the purpose of affording compensation to persons who are injured by the operation of the act. Considering the object of the clause, I should

say, that any persons who are so injured in their interests, are, for the purposes of receiving compensation for such injury, owners and proprietors within the meaning of the act.

Rule refused.

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EVANS v. DAVIES.

ASSUMPSIT on a promissory note, made in 1809. *Plea*: the Statute of Limitations. The parties were related by marriage, and the note in question was given in the year 1809, on occasion of that marriage. There were indorsements of the payment of interest upon the note up to the years 1814 and 1818, and the indorsements for these two years were in the plaintiff's hand-writing. From that time no payment had been indorsed; but in the year 1831 the plaintiff's son went to the defendant's house, and having found him in the garden, said that his father had sent him for a pound. The defendant went into the house and brought out the money, and said, "This puts old Mr. Evans and me straight for the last year's interest, all but 18s. I will come up next week and pay that, and get a receipt." The jury gave a verdict for the plaintiff.

Where a part payment is made by a party who owes a debt to another, and there is no proof of any but one demand existing between the parties, such part-payment, and the words accompanying it, may be referred to this one debt; and though the words used do not expressly mention any debt, it shall be sufficient to take it out of the Statute of Limitations.

R. V. Richards moved for a rule to set aside the verdict and enter a nonsuit. These expressions, though accompanying the payment of a sum of money, are not sufficient to take the case out of the statute. There is nothing to show that the words referred to the note on which the action was brought, or that the payment was in respect of that note. The sum paid on the occasion referred to does not tally with any amount of interest due for any one period on the note. The burden of showing that the expressions apply to the debt in question, is thrown on the plaintiff. There is no proof of that sort here. This case resembles that of *Tippett v. Heane* (a), where it was distinctly held, that in order to take a case out of the Statute of Limitations, by a part payment, it must appear that the payment was made on account of the debt for which the action was brought, and that it was made as part payment of a greater debt. In that case it did not appear that there was any other account existing between the parties, and the jury had therefore inferred that the payment, which was clearly proved, must be on account of that debt; but the Court held, that it must not be mere matter of inference, but that the fact must be clearly proved.

Cur. adv. vult.

Lord DENMAN, C. J. subsequently (22nd April) gave judgment.—This was an action of debt on a promissory note. The plaintiff had a verdict, and a rule was moved the other day, by Mr. Richards, to set aside that verdict. The Statute of Limitations had been pleaded to this action, and to take it out of the statute a part payment was attempted to be proved. That proof was, that the defendant was called upon by the plaintiff's son, who came to him when in the garden adjoining his house, and said, "My father has sent me for 1l." The defendant went into the house and brought out the money, and

(a) 1 Crompt. Mees. & Rosc. 252.

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said, "This puts old Mr. *Evans* and me straight for all but 18s." It was said that these words did not take the case out of the statute, and this argument was rested on the authority of a case of *Tippetts v. Heane* in the *Exchequer*, where Mr. Baron *Parke* held, and the other judges then concurred with him, that it must distinctly appear that the payment was made on account of the debt for which the action is brought. We have had a communication with my brother *Parke*, and we think the two cases essentially different; and we think also, that the words in the present case are quite sufficient to take the case out of the statute, the more especially as there was no proof of any other debt existing between these parties. As there was no other debt, the jury was warranted in referring this expression to the debt of 100*l.*, and the plaintiff was entitled to recover the balance actually due. There will, therefore, be no rule in this case.

Rule refused.

BARTLETT v. PERNELL.

Where an executor, before a sale of the goods of a deceased testator, tells a legatee, that she may purchase to a certain amount (the amount of her legacy), and that such purchase shall be an off-set to her legacy; such declaration amounts to a special contract as to the mode of payment, and may be given in evidence in an action for the value of the goods sold, brought by the executor, though the sale was by auction, subject to written particulars of sale.

ASSUMPSIT, partly for goods sold and delivered to the amount of 140*l.*, and partly for the sum of 40*l.* for agistment of cattle. At the trial before *Bolland, B.*, at the last Spring Assizes for *Somersetshire*, it appeared, that the goods in question had been sold by auction, at the sale of the effects of the deceased; that there were written conditions of the sale, in which, at the time of the sale, the auctioneer in the usual manner wrote down the name of the purchaser. The defendant became the purchaser of goods to the amount of 140*l.*, and took away the different articles at the time of the sale. The sale lasted two days. Evidence was tendered that the plaintiff had said, that the defendant was entitled to a legacy of 200*l.* under the will of the deceased, and that she might buy goods to that extent, and that the purchase should be an off-set against the legacy. This evidence was objected to as inadmissible, on the ground that it was evidence which went to vary a written contract. The learned judge, however, received the evidence, and left the case to the jury. A verdict was taken for the defendant, leave being reserved to the plaintiff to move to enter the verdict for either 40*l.* or for 180*l.*, including the amount for the goods, if the Court should be of opinion that the evidence relating to the declarations of the plaintiff had been improperly received.

Erle now moved accordingly, and cited *Gunnes v. Erhart* (a), where it was held, that the verbal declarations of an auctioneer, at the time of the sale, were not admissible evidence to contradict the printed conditions. In *Powell v. Edmunds* (b), the same rule was adopted; and it was held, that, on a sale of timber growing in a certain close, where the printed conditions of sale said nothing about the quantity, the parol declarations of the auctioneer, at the time of the sale, warranting a certain quantity, were not admissible in evidence, as varying the written contract.—[*Patteson, J.*—In the cases cited the contract is altered by the conversations, as respects all the purchasers; but in this case the defendant says, that she did not purchase at all under that contract.]—In *Shelton v. Livins* (c) that objection was anticipated, and it

(a) 1 Hen. Black. 289.

(b) 12 East, 6.

(c) 2 Crompt. & Jer. 411.

was there held, that the printed particulars under which a sale by auction proceeds, cannot be varied by parol evidence of a verbal statement made by the auctioneer at the time of the sale : and that it makes no difference that the question arises on a sub-sale of the same subject-matter by the purchaser.—[Lord *Denman*, C. J.—But here the defendant says, that she purchased under a contract specially made with her before the time of the sale.]—The auctioneer could do nothing before or after the commencement of the sale to vary the written contract. Neither can the party who directs the sale.

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LORD DENMAN, C. J.—The jury must have found that the bargain was made as to the whole matter, subject to the opinion of the Court as to the admissibility of evidence of that bargain, under the particular circumstances of this case. Supposing that to be so, I do not know why this bargain cannot be proved. The auctioneer takes down the name of the purchaser at the time of the sale. In some cases that would be binding on the purchaser, for the auctioneer is the agent of both parties. But in this case it is not so. There was a special agreement made by the plaintiff himself with the defendant, before the sale, as to the mode of payment, and the sale to her must be taken to be founded on that agreement. There is no objection to evidence of the fact of such an agreement being made. It cannot be taken, as a matter of law, that the auctioneer must necessarily in all cases be the agent between the parties. He may be so, but that depends upon circumstances. These circumstances show that in this case he was not the agent.

LITTLEDALE, J.—The defendant here did not think that she was exempted from the general conditions of sale, but only so far as the mode of payment went. The purchase by her was, of course, put down by the auctioneer like other purchases, in order that the plaintiff might know how much was to be deducted from the legacy. But that did not put an end to the agreement, as to how she was to pay for what she purchased.

PATTESON, J.—I do not think that this case will at all infringe on the rule as laid down in the cases cited. An auction is in the nature of any other sale, and the principle of law is, that if the sale takes place upon written conditions, you cannot vary those conditions by parol. But that is not the case here; for before the sale there was a private agreement between the parties, so that here the auctioneer was not, as in other cases, the agent between them. In all the cases cited the purchase was made under conditions of sale, which were proposed to be altered by parol; but here the defendant says, that she did not purchase at all under the conditions of sale, but under a private contract made before the time of the sale.

COLERIDGE, J.—The evidence was perfectly admissible. The writing of the fact of the purchase by the auctioneer, in the usual manner, was quite consistent with the purchase having been made under the private contract entered into between the plaintiff and the defendant, as to the mode of payment. The permission to the defendant to take the goods as an off-set against the legacy, was the mode by which the parties agreed that the defendant should be paid her legacy.

Rule refused.

King's Bench.

HARRISON and another v. ROUND.

The overseers and churchwardens of a parish have not such a special property in the books of account kept by the surveyor of highways, under the 13 G. 3, c. 78, s. 48, and the 58 G. 3, c. 69, s. 6, as to enable them to maintain trover against a surveyor who has gone out of office, but who refuses to deliver up the books. They must proceed against him under the provisions of these statutes.

TROVER by the present churchwardens and overseers of *Wednesbury*, against the defendant, for books of account, rate-books, &c.: *Pleas*: first, not guilty; second, that the plaintiffs were not possessed as of their own property; third, the Statute of Limitations. The plaintiffs took issue on all these pleas. At the trial before *Alderson*, B., at the last *Staffordshire* Spring Assizes, it appeared that the defendant had been churchwarden of the parish of *Wednesbury*, and in 1826 had been appointed the surveyor of the highways of that parish. He continued in that office from *Michaelmas*, 1826, to 1830; and again from 1831 to 1832. When the last year of office expired, he attended a meeting of the vestry, and claimed a sum of 152*l.* as due to him upon a balance of accounts; and he insisted that he ought not to go out of office, or to deliver up the books, without having some security for that balance. Some of the members of the vestry entered into an undertaking to secure him payment of the balance that might be found due to him: and on his part he undertook to deliver up every thing he possessed relating to his office. The money claimed by him had since been paid. The defendant attended before the magistrates to be sworn to his accounts in *December*, 1832; but they, not being satisfied with his statements, adjourned the matter to a future period. There was an order of the vestry, on the subject of these books, directing the defendant to deposit "the vestry accounts and vouchers for the years 1828, 1829, 1830, 1831, and 1832;" and there was a resolution of the vestry, that these "accounts and vouchers should be deposited in the hands of the churchwardens for the present time." Notice of the meeting, and of the order and resolution, had been regularly given to the defendant; and a further notice was served on him, stating, that if, within six days, he did not deliver up these accounts and vouchers, proceedings would be taken against him. He did not deliver them, but said, that the churchwardens might get them as they could. It was objected for the defendant, that this action was not maintainable at the suit of the churchwardens, for that they had no such possession as would entitle them to bring trover. The learned judge thought the objection valid, and directed a nonsuit.

Ludlow, Serjt. now moved to set it aside. The statute 58 *Geo.* 3, c. 69, s. 6, which gives another proceeding against a person in the situation of the defendant, does not take away the right of any person to bring trover. That statute makes the books the property of the churchwardens for the time being, and positively requires, that they shall be delivered according to the order of the inhabitants in vestry assembled.—[*Coleridge*, J.—And imposes a penalty, to be inflicted by two or more justices, upon the party guilty of a refusal to deliver according to such order.]—Yes, but that is merely a cumulative provision, for the statute goes on to say, that the party so offending may also be proceeded against in any of His Majesty's Courts, "civilly or criminally, in like manner as if this act had not been made." Suppose some mere wrong-doer had obtained possession of these books, the churchwardens, who, as guardians of the parish, have a special right of property in them, might maintain trover against him. By the 13 *Geo.* 3, c. 78, s. 48, the surveyor is directed to keep these books, to produce them for the inspection of

the inhabitants, to verify the accounts before a magistrate, and then to hand them over to his successor.—[*Patteson, J.*—The words there are, 'churchwarden or overseer, in the singular number.']—That makes no difference; the object of the act being, that the books should be kept in the public chest, for the use of the parish. The overseers and churchwardens are the parties who ought to have the custody of these books for such a purpose; and, therefore, they have a special property in the books sufficient to enable them to maintain this action. The books are parish property.—[*Coleridge, J.*—Are they so when the surveyor's accounts have not been allowed?—]But here they have been allowed, and a sum of 2*s.* 6*d.* was allowed for the book itself. The books are the special property of the churchwardens, and the right of property in a chattel draws with it the right of possession, as in the case of lead taken from a mine. The vestry here gave the order for the books to be delivered up to the churchwardens for the year 1832. They have since gone out of office, but their successors have the same right of property in the books, and the refusal by the defendant is a good ground of action.—[*Coleridge, J.*—You rely on this as on a broken contract; but there is a case in the *Exchequer*, where the overseer brought *assumpsit* against a parishioner, and the Court held, that the action was not maintainable. The undertaking, if any here, was to the vestry and not to the plaintiffs.]—The contract here is sufficient to make the breach of it amount to such a tort as will sustain an action. If the churchwardens of 1832, 1833, had a title, their successors have now the same right.—[*Patteson, J.*—The churchwardens for this year might maintain an action for the church plate delivered four years ago, for the churchwardens are a corporation for matters connected with the church: but are they so for other purposes?—]They are sufficiently so in this case, particularly after the order of the vestry.

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LORD DENMAN, C. J.—It appears to me, that this nonsuit was perfectly right. The plaintiffs do not, by merely showing that they have a right to the custody of the books, thereby enable themselves to maintain trover for them. The act says, that the books shall be kept by particular individuals; and enforces this order by a penalty, which, in case of disobedience, it directs, that the out-going surveyor shall pay. It does not necessarily follow, that that penalty is merely cumulative; on the other hand, it may happen that the person who has a right to enforce it may not be able to do more than get it inflicted in the way directed. That might have been the very object of the legislature, as it might be considered that it would be frightful if, for every case of detention of this kind of books or papers, there was to be a separate action. There might possibly be some question, whether there should have been a nonsuit on the second issue, as that stood alone; but it depends upon the other, and I see no reason for granting the rule.

LITLEDALE, J.—I am of opinion that this nonsuit was perfectly right. What does the statute 13 *Geo.* 3, c. 78, s. 48, say? it provides, that the surveyor for the time being shall keep the books, which are to be delivered over by him to his successor; and in case he shall neglect to do the things thereby required, he shall forfeit any sum not exceeding 5*l.*, nor less than 40*s.*; and there are other penalties, for other defaults, provided in the statute. There is nothing to show that this is cumulative. Though it is a

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breach of duty in the surveyor, on going out of office, not to deliver over the books ; still the special property which he has in them, by right of his office, is not transferred till they are actually delivered up. As to the 58 *Geo.* 3, it declares the manner in which the books shall be kept when they are delivered up, and who shall keep them ; but the penalty there given against any person who shall neglect or refuse to comply with the directions of the act is distinct in itself. But then it is said, that there is a proviso afterwards, which declares, that any person who shall refuse or neglect to comply with the directions of that act may be proceeded against, as if the act had not been made. The first part of the section merely imposes a penalty if the books are not delivered over ; and the second provides, that the party offending may be proceeded against in the same way as if that act had not been made. How is that ? Why, he may be proceeded against under the 13 *Geo.* 3, c. 78. The officers of a parish have no succession, so that they can be said to succeed each other in the right to take proceedings of this description ; and it appears to me, that till the books have been actually delivered over, no property has passed.

PATTESON, J.—The legislature has not thought fit to vest the property in these books in any persons whatever. It is said, that, by one of these acts the vestry may appoint the persons to have the custody of these books, and that the churchwardens have been appointed for that purpose by the vestry. But though the vestry may declare who are to keep the books, it cannot declare who are to have the property in them. I do not see how the present churchwardens can have the property in the books. Nor even how the churchwardens of 1832 could have it, much less how it could be vested in their successors. If we were to hold that the present churchwardens could maintain this action, it would be equal to saying that their successors would be able to maintain an action of this kind for all the property, of whatever kind, that might have come into the hands of their predecessors. My brother *Ludlow* says, that he who has the right of custody of these books and papers may maintain this action for them. I, however, cannot find it any where laid down, that where a man has not the custody of property, though he may be entitled to have it, he can maintain an action, like the present, to obtain that custody. He may maintain such an action after he has had the custody of the property, if such property is unlawfully removed out of his possession, but he cannot get the custody by such an action.

COLERIDGE, J.—To maintain an action, like the present, there must always be a right of property general or special. What is the right here ? The argument is, that the defendant is a wrong-doer, and that the books ought to be delivered up to the parish officers, according to the provisions of the statute, and according to the defendant's own undertaking. It is said that the parish officers of 1832 might have sued for them. I doubt that very much. But then, supposing this to be so, it is said, that, if they could have sued, it follows that the present plaintiffs, their successors, may sue. I do not think that they can. Though I should be sorry to dismiss such a case without the fullest consideration, if I had any doubt upon it, I confess that I cannot doubt upon elementary propositions like these ; and I know that this Court has, in cases like the present, granted writs of *mandamus* to compel the delivery up

of such documents, because the party applying had no legal title which he could enforce in this way by action, though he might be otherwise fully entitled to the documents. And if a *mandamus* was applied for, under circumstances like the present, the Court would not be stopped from granting it, on the ground that the right to the custody of the books would support an action like this.

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Rule refused.

HOPKINS v. CROWE.

ASSAULT and false imprisonment. *Plea*: not guilty. At the trial before

Lord Denman, C. J. at the sittings at *Westminster* after last term, it appeared that the plaintiff was a cab-driver, who had been permitted by a cab-proprietor to take out a horse and cab, on certain terms agreed on between them: that the plaintiff returned at an unseasonable hour at night with the horse in a distressed state, and showing that it had been cruelly ill-treated. The defendant, who was the son of the cab-proprietor, demanded from the plaintiff the money agreed to be paid for the use of the horse and cab, and complained of the state in which the horse was. The plaintiff said that he had earned no money with the horse, and had none to pay to the defendant. The defendant then called in a policeman and said, "There is a man who has brought me home no money, who has ill-treated the horse." The policeman said, "I have nothing to do with the money, but if you charge him with ill-treating the horse, I will take him into custody." The defendant said, "I do charge him with ill-treating the horse." On which the policeman took him into custody. Upon going before the inspector, the same complaint was made, and the same answer given as was given by the policeman, and the charge was taken "Cruelty to an animal." The charge was subsequently dismissed. The question was, whether the defendant was justified in what he had done by the provisions of the 5 & 6 *Will.* 4, c. 59, passed to prevent cruelty to animals. By the 9th section of that statute it is enacted, "That when and so often as any of the said offences shall happen, it shall and may be lawful to or for any constable, or other peace officer, or for the owner of any such cattle, upon view thereof, or upon the information of any other person, who shall declare his, her, or their name or names, and place or places of abode, to the said constable or other peace officer, to seize or secure, by the authority of this act, and forthwith, without any other authority or warrant, to convey any such offender before any one justice of the peace within whose jurisdiction the offence shall be committed, to be dealt with according to law, &c." It was insisted that the defendant had acted *bona fide*, and ought therefore to be protected; and the learned judge was required to leave the question of *bona fides* to the jury. He declined to do so, but reserving the point, he left the case to the jury to say whether they were of opinion that the defendant's conduct was that of merely giving information, or whether they thought that he had given the plaintiff into the custody of the policeman. He said, that in the first case their verdict would be for the defendant; but if they thought that the defendant had given the

A person who is not the owner of an animal cannot, under the 5 & 6 *Will.* 4, c. 59, s. 9, direct a police-officer to take into custody a person who has ill-treated it, unless such person saw the ill-treatment inflicted. In such a case the *bona fides* of the intention of the person giving the charge affords him no protection under the statute, in an action of trespass.

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plaintiff into custody, they must find a verdict for the plaintiff. The jury returned a verdict for the plaintiff, damages 5*l*.

Sir *F. Pollock* now moved for a nonsuit.—There was no question in this case whether in fact the horse was ill-treated, and the defendant was the son of the owner of the horse. The defendant, in answer to a question from the policeman, said, that he did charge the plaintiff with having ill-treated the horse, and the policeman then took the plaintiff into custody. If the defendant had been the owner of the horse, the words of the statute would have authorized him to take the plaintiff into custody, without the presence of the officer. The defendant, not being the owner, did not attempt this, but calling in a peace officer, he acted in accordance with the spirit of the act, and must be protected in what he has done.—[*Patteson, J.*—The act requires that the person giving information shall declare his own name and place of abode.]—That was not necessary here, for the defendant was at home, and his name and place of abode were known. This case must be governed by the principle laid down in *Pratt v. Hillman* (*a*), where a party raising a party-wall was shown to have intended *bond fide* to comply with the directions of the building act, but did not in fact do so. He injured the adjoining house, the owner of which brought trespass; but it was held, that, under these circumstances, the raising of the wall was to be considered as done in pursuance of the statute, and that the defendant was entitled to the protection given by it. The statute here gives the officer the power to arrest on view, or on information, and any one may give information to the officer. The defendant did so here.—[Lord *Denman, C. J.*—The information given to the officer is the substitute, so far as he is concerned, for the view; but what the defendant did here amounted to a direction to him to take the plaintiff into custody.]—[*Patteson, J.*—If a man said to an officer, I charge this person with felony, and the officer took into custody the person charged, the officer would be justified, though the man might not. This defendant is merely in the situation of a stranger giving the plaintiff into charge.]—What the defendant said did not amount to giving the plaintiff into charge. He merely gave to the officer the information which entitled him to call on that officer to do what the statute authorized. The defendant intended to do no more than the act justified him in doing, and he is therefore entitled to protection.

PATTESON, J.—This is a very clear case indeed. It is true that the defendant told the officer something, but the officer declined to act on the information thus given, and the defendant then took upon himself to direct the officer to take the plaintiff into custody. The defendant made the officer his servant for this purpose, and so made himself liable to an action of trespass. If not, this action could not be maintained. Taking that to be so, is he not within the operation of this act? The act gives protection to the owners of the cattle and to police-officers. The defendant is neither the one nor the other. But then it is said, that he thought he was acting *bond fide* upon the statute, and therefore ought to be protected. If that argument could be adopted by the Courts, see to what an extent it would go. The

(*a*) 4 Barn. & Cress. 269.

game laws authorize the owner or his servant to arrest persons who are found shooting upon his grounds. Upon this argument, any stranger who thought he was acting right in enforcing the provisions of the act, might take upon himself to arrest a man whom he thought to be trespassing on another person's property. But the law gives him no such right. The defendant here having arrested the plaintiff as he did, and not having proceeded under the statute, he has made himself liable to this action. The case on the building act is quite different from the present, for there the person was the person described in the statute, and meant to be protected; but he took a wrong step, and was protected merely as the proper person described in the statute. The defendant is not so here.

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COLERIDGE, J.—I am entirely of the same opinion. This case does not in the least degree infringe on the authority of the case of *Pratt v. Hillman*. The statute must be complied with in substance; there need not be a strict compliance with the very terms of it, in order to afford the person protection. If a man give the officer information, and that information be overcharged, still, if it be *bonâ fide* given in pursuance of the statute, the person would be protected. But here the defendant has done more than merely give information, he directed the officer to take the man into custody. Has he a right to do that? No, he has not; for he does not come within the description of either of the two classes of persons named in the statute. The verdict, therefore, was perfectly right.

LORD DENMAN, C. J.—It would be entirely wrong if the law was not what it is upon this subject, for when a man says, as the defendant did here, that he directs the officer to take another person into custody, he ought to be responsible for giving such a direction. Having thus occasioned the arrest, and not being a person within the description of persons who by the statute are entitled to do so, he has made himself liable, and is not protected in what he has done. It is quite clear that the statute was meant to apply only to the owner—to the person who saw the cruelty committed, or to the officer who acted upon information given him that it had been committed.

Rule refused.

COLEBROOKE v. TICKELL and another.

SPECIAL case, stated under 3 & 4 Will. 4, c. 42, s. 25. Trespass, for seizing the goods of the plaintiff under a distress. The defendant, under the 21 Jac. 1, c. 12, and under local acts 11 Geo. 3, c. 15, and 46 Geo. 3, c. 89, pleaded the general issue. The case stated, that by 11 Geo. 3, c. 15, certain commissioners were named and appointed for the purposes

1. The word "hereditament," when used as a description of property liable to be rated in a statute, need not necessarily be

construed in its large and legal sense, but when found with other words may be construed with them as a word *ejusdem generis*. Therefore, where a local act imposed a rate on every person who "should inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament:" it was held, that the word "hereditament" meant only such as were capable of corporeal enjoyment, and did not extend to make liable to be rated a money payment in lieu of tolls.

2. The burden of proving that a party is liable to be rated by the operation of a local act of parliament for property for which he was never before liable to be rated, lies on the party seeking to impose it.

3. *Per Coleridge, J.* The words of a local act of parliament, imposing a charge upon those who were never before liable to it, should be so clear and express, that the Court should be able to see that the persons to be charged have had due warning of the intention to charge them.

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therein mentioned, and a clause therein recited, that there was due, and of right belonged to the lord of the manor of *Stepney*, as owner or proprietor of the market, a certain toll; that certain other tolls were due and payable to the householders and inhabitants: and it enacted, that a certain toll (in amount including the three,) should be paid, in lieu of the tolls so due, to the receiver or collector appointed under the act, the said receiver or collector paying thereout to the lord of the said manor, or such other person as should be owner or proprietor of the said market &c., the sum of 2*d.* By another act of parliament, 46 *Geo.* 3, c. 89, certain trustees were appointed to make rates for the relief, maintenance, regulation, and employ of the poor of the parish of *Whitechapel*, &c. By the 53*d* section, the rector, churchwardens &c., were required to make and sign three distinct rates or assessments, not exceeding the amount of the respective sums so settled and ascertained, "upon all and every person who did and should inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement or hereditament, &c." The plaintiff is lord of the manor of *Stepney*, and owner and proprietor of the market mentioned in the act of 11 *Geo.* 3, and was and is, as such lord of the manor and owner and proprietor of the market, entitled to the sum of 2*d.*, clear of all charges and expenses, for every cart or waggon loaded with hay brought into the parish, and sold or exposed for sale there on the usual market-days, as in the act mentioned, which the plaintiff has duly and regularly received, and which has yielded to the plaintiff an annual profit, exceeding the sum at and for which he was rated. The defendants were the justices issuing the warrants of distress &c. for a paving-rate made under the 11 *Geo.* 3, and for a poor-rate under 46 *Geo.* 3. There is no ground for rating the plaintiff, unless the Court shall be of opinion that he was rateable for and in respect of the said market, or the said money payment in lieu of toll in respect of which he has been rated.

Sir *W. Follett* for the plaintiff.—The right to receive the whole toll is vested in the commissioners, and the question is, whether the plaintiff is liable to be rated for his share, which he receives in lieu of the market tolls. In the first place, the plaintiff is not an inhabitant nor occupier within the parish, nor is he an owner of property there, except so far as he is entitled to the sum of 2*d.* per load of hay out of the market tolls. The law now is clearly settled, that an incorporeal hereditament is not rateable; *Rex v. Bell* (a). Quit rents and profits of that sort are clearly not rateable. The local act here has not made any difference. It is said, that under the term "hereditament" the plaintiff is rateable in respect of these tolls. In the first place, the market tolls here are not in the plaintiff: he has no power to name them. They are, by the 11 *Geo.* 3, vested in the commissioners, who are the occupants in respect thereof, and are bound by the act to distribute them in a certain manner. The mere right to receive the 2*d.* will not make the plaintiff liable. It is quite clear that the word "hereditament," in this clause of the act, must be construed with the other words found in the same clause, and must receive the same construction with them. If the legislature had meant to make every hereditament rateable, it would have used words fit to effect such a purpose. It would have been sufficient to say, that any one

(a) 5 Maule & Selw. 221.

who enjoyed any hereditament should be liable to be rated; for all the rest of the words would have been included in that expression. Many other clauses show that this is the proper mode of interpretation. In *Rex v. The Manchester and Salford Waterworks* (a), a meaning was given to the word "tenement," which was read in conjunction with other words found in that and in other sections of the act, and received a meaning as a word *ejusdem generis*. And in *Rex v. Mosley* (b), in which the word "tenements" was used in conjunction with the words "houses, buildings, and gardens," in a local police act, the owner of certain markets kept in the streets of M., in which various articles were exposed for sale by persons who paid him for that privilege, but had not any stalls fixed to the ground, was held not the occupier of a tenement within the meaning of the act, and therefore was not liable to be rated in respect of the profits of such markets.

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The *Attorney-General*, for the defendants.—The sole question is, what is the meaning of the word "hereditament" as used in the 53d section of the 46 Geo. 3, c. 89? *Prima facie*, the word "hereditament" has an extensive signification. The burden of proving that it has not in the present case, lies upon the plaintiff. In both the cases last cited, the words "occupiers of" were used in the clause, which therefore related to the rating of occupiers of a tenement, and the sort of tenement intended was thus clearly pointed out. Those cases therefore do not apply to the present, for the words "occupiers of" are not here. The words are "inhabit, hold, occupy, possess, or enjoy." Then, *reddendo singula singulis*, these verbs apply respectively to "house, shop, warehouse, or other building, tenement, or hereditament." The verb "enjoy" refers to the word "hereditament," and the man who receives a fixed sum from a house, is as liable as the man who occupies the house. The first objection made on the other side is, that the trustees should have been rated, not the lord of the manor. But they are clearly not liable. They have not any beneficial occupation or enjoyment. The *cestui que trust*, the lord of the manor, is the person to be rated. In *Rex v. Shrewsbury* (c), the Court refused to construe the word "hereditament" as a word *ejusdem generis* with others in the same clause.—[*Coleridge, J.*—That was, because a particular clause of exception showed, that in the act there under consideration, it was not to be used in a restricted sense.]—The word "hereditament" has two meanings, and must not necessarily be construed according to the more limited of them. The words here are not "building, tenement, and hereditament," but "or other building, tenement, or hereditament." So that by the use of the disjunctive, the word "hereditament" is completely separated from the rest of the words in the sentence, and must not be construed according to their signification.

Sir W. Follett, in reply.—There is no such separation between the different words of this clause as to give some of them a different meaning from the rest. The close of the sentence now under consideration shows what is the meaning of the term "hereditament," as used here. It declares that the rate is to be restricted to such parts of the parish as are not within the

(a) 1 Barn. & Cress. 630. (b) 2 Barn. & Cress. 226. (c) 3 Barn. & Adol. 216.

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liberties of the city of *London*. If "hereditament" was to have the general meaning now contended for, no such limitation could be fixed upon it.

LORD DENMAN, C. J.—The plaintiff must have judgment in this case, for the rate has been improperly made. He certainly enjoys an hereditament, in one sense of the term, but the language of the act must be taken in a restricted sense, according to the rule laid down in *Rex v. The Manchester and Salford Waterworks*, and *Rex v. Mosley*, and that class of cases; and, with respect to them, it appears, that to make a party liable to a rate for property of this description, he must clearly be shown to come within the description of an actual occupant. It is said that the words of the act are large, and so they ought to be, for the purpose of raising any liability on which to charge the plaintiff; for it lies on the party attempting for the first time to impose that charge on him, to show that he is liable to bear it. I am not able to say that he would be liable, but from the subject-matter of the clause itself. The 53d section shows that the liability now contended for must be restrained, for it says, that such last-mentioned rate (referring to the pound-rate to be imposed on property within the city,) shall be a pound-rate according to the value of the property to be assessed, as held or occupied by parties within the said liberties. This shows that the words must be applied to such tenements and hereditaments as may be the subject of corporeal occupation. The pound-rate also applies to market-tolls, and it appears to me that these words must be taken as an exposition of the catalogue of words to be found in the same section, so that the owner of tolls does not fall within the description of persons to be rated.

LITLEDALE, J.—I do not doubt that the word "hereditament" is of itself sufficient to reach the tolls of a market, but the question is, in what sense this word is used in the present act of parliament. I think that it must be construed according to the subject-matter of the whole sentence. If it is found among other things which cannot be described as hereditaments, it must be confined and restricted in its application to things of the same nature as those with which it is found united. I think that in this case it means something which can be the subject of actual occupation. The first act, the 11 *Geo. 3*, which forms part of this case, is an act for the better paving, &c. of the district therein described. The 34th section, for the purpose of defraying the charges and expenses thereby occasioned, authorises the imposition of a certain rate of 1s. 6d. in the pound on the annual rents or values of "any house, warehouse, cellar, vault, tenement, or other hereditament." These words show that the term "hereditament" is used in the sense of the matters before mentioned in the first part of the clause. But this is even more clear under the terms of the 46 *Geo. 3*, by which this question must be decided. There the statute directs, that the trustees shall ascertain the value of the property occupied by the persons liable to be rated. The tolls could not be considered local property to be occupied. Then how are these rates to be imposed? In the same way as rates made under the statute of *Eliz.* Statutes made since the statute of *Eliz.* have from time to time done away with the exceptions therein contained. That may be right, but to create a liability in respect of any thing which was before exempt from being rated, the liability should be shown by the party seeking to

charge another therewith, to be created by clear words, having a clear meaning. That is not shown in the present case. Here there are some words of importance—they are these: “Shall pay during the time of such occupation.” These words show the meaning of the legislature to be, that the things to be rated should be things capable of occupation. I cannot see any where any intimation of the legislature having a different object in view.

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PATTERSON, J.—It appears to me that the plaintiff is clearly entitled to our judgment. Previous to the year 1771, the plaintiff was lord of the manor of *Stepney*, and was entitled to receive 2*d.* for each cart and waggon loaded with hay, and exposed for sale within the parish. In that year commissioners were appointed by act of parliament to regulate these tolls, and they settled, that in lieu of all tolls whatever, a sum of 6*d.* should be paid. Now it is conceded, that, previous to the statute, the plaintiff was not liable to be rated, and certainly he did not become under this statute entitled to the tolls, or liable to be rated in respect of them; for there is no clause in this statute which authorizes the commissioners to make a rate. I do not understand that any argument has been raised upon any act prior to the 46 *Geo.* 3. That act was then passed, and we are asked, on the general words of it, to introduce a new subject-matter of rate. We are to make this plaintiff liable to a rate upon the word “hereditament” introduced in a local and personal act, passed behind the back of the lord of the manor, and thus to saddle him with a liability to which he was never before subject. If the legislature had any such intention, it is extraordinary that language was not used more clearly expressive of it; and that those who sought to make a new charge on what was not before rateable at all, should not introduce some express enactment clearly to that effect. Yet they have not done so. Here are words declaring, that rates shall be imposed on all persons who “inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament.” If it was meant that this should be any tenement or hereditament, according to the legal meaning of the last term, why put in all these words before them? These words must be construed as words “*ejusdem generis*.” They must be so, according to the authority of *Rex v. The Manchester and Salford Waterworks* and *Rex v. Mosley*. Those cases must govern the present. The case of *Rex v. Shrewsbury* does not apply: for there, some particular words used as an exception gave a meaning to a part of the general provision. That case is not an authority to compel us to give the construction here contended for, which is contrary to the meaning of the act, and affects the rights of those who were not before liable.

COLERIDGE, J.—It is conceded that “hereditament” means, in the large and legal sense of the word, an enjoyment; but it is not denied, that though that is so, still it does not necessarily and in every case have that meaning. We must decide what is the meaning of the word in the present instance. The plaintiff contends, with respect to something in the section itself, and to the way in which the word is used in a previous act, that it must be construed in a restrained sense, and as a word *ejusdem generis* with those which have preceded it. On the other hand, it is contended that it must have a larger meaning given to it, according to its legal import, because it is

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just that all classes of persons and property should contribute to these rates. Then the question is, on whom does the *onus* of proof lie. That is to be determined by another question. What was the state of the parties before the statute was passed? It is conceded, that before this statute there were church and poor-rates in this parish, and further, that this property was not originally rateable. It is for those who would bring it within the statute, and who seek to make a man rateable who was not rateable before, to state, in clear and unambiguous terms, their intention, so that the Court may see that the persons to be charged have had due warning of that intention, to enable them to oppose in time the passing of the act. A paving-rate perhaps stands in a peculiar light, but it is as just that the parties should have full notice as to that, as to any other new burden intended to be cast upon them. No one who reads this act can doubt that the persons who are to be assessed are the holders of particular local tenements, though the word "hereditament" is introduced afterwards in the latter part of the clause: the party who pays is entitled to a deduction of one-third of the rent. The word, therefore, is confined to the holders of corporeal hereditaments. Then in the 53d section there is a specific provision as to a particular rate, and it is conceded that that must have a local limit, for that is to be a pound rate on all messuages, lands, &c. which are occupied within a part of the parish which is not within the liberties of the city of *London*. I cannot doubt, therefore, that these hereditaments are corporeal hereditaments locally situated within the parish, and are not to be understood in the larger sense of the term in the way in which tenements and hereditaments are sometimes understood. We have abundant right to say, that the burden of proving this liability lies upon the defendants, and that they have not satisfactorily performed their task in that respect.

Judgment for the plaintiff.

PIGGOTT v. RUSH.

Assumpsit, for unliquidated damages, is an action within the saving clause (s. 7) of the Statute of Limitations, 21 Jac. 1, c. 16.

ASSUMPSIT against an attorney for negligence in defending a Chancery suit. *Plea*, the Statute of Limitations. *Replication*, that at the time of the accruing of the cause of action, the plaintiff was imprisoned, and that she continued so imprisoned until and up to 11th June, 1834, which day was the first time of her being at large after the first accruing of the cause of action; and that she commenced the action within six years after the first time of her being so at large. *Rejoinder*, that the plaintiff commenced the action while she was so imprisoned, and continued so imprisoned, and before the first time of her being at large therefrom, and that the several causes of action did not, nor did any of them, accrue to the plaintiff at any time within six years next before the commencement of the action, as in the plea alleged. *Special demurrer*, alleging a tender of an immaterial issue, and joinder.

Mansel, in support of the demurrer.—The rejoinder is unquestionably bad, and the question turns on the replication. The saving clause of the 21 Jac.

l, c. 16, s. 7, excepts cases where the plaintiff is imprisoned at the time the cause of action first accrued; and the limitation does not begin to run until he is at large. *Chandler v. Vilett* (a) determines that the saving clause applies to actions of *assumpsit*.

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Hayes, contrâ.—The plaintiff must bring herself strictly within the saving clause. That only enables persons under the disabilities mentioned to proceed after the removal; and it is on this record admitted by the demurrer, that the action was in fact brought before the disability had ceased. The saving clause ought to be construed strictly as well as the limiting clause. This is an action of *assumpsit* for unliquidated damages, and that is not within the saving clause; that clause in terms speaks only of actions on the case for words; and, although in *Chandler v. Vilett* it was held that an action on the case on *assumpsit* was within the equity of the clause, that was merely *indebitatus assumpsit*: that case is therefore distinguishable, and indeed can hardly be supported on principle, as its effect is to extend by intendment, in a very forced manner, the express words of a statute. [*Patteson, J.*—In *Crosier v. Tomlinson* (b), the Court determined that an action of *indebitatus assumpsit* was comprehended in the term “trespass” in the clause.] That certainly was done, but the same objection, on principle, applies also to that case.

Mansel, in reply.—The saving clause relates to all such actions as are enumerated in the limiting clause; and therefore clearly applies to the present action.

Lord DENMAN, C. J.—According to the authorities it is admitted to be quite clear that an action of *indebitatus assumpsit* is within the saving clause of the statute. This may have been a strong conclusion to have come to, but as it is evident that there is an omission by the legislature, and the matter has been expressly determined, we should not be justified in overturning those decisions. I cannot see any distinction between an action of *indebitatus assumpsit*, and an action like the present in *assumpsit* for unliquidated damages. I think, therefore, that we are bound by the authorities; and must give our judgment for the plaintiff.

LITTLEDALE, J.—I am of the same opinion. I think that we are bound by the cases which have been cited, though I cannot say that I think they were rightly decided.

PATTESON, J.—I cannot see how we can decide that this case is not within the seventh section of the statute, without overruling *Chandler v. Vilett*, and *Crosier v. Tomlinson*. It has been attempted to distinguish these cases, on the ground that they extend to actions of *indebitatus assumpsit* only, and not to actions of *assumpsit* for unliquidated damages: but as both are equally actions on the case, I think that these decisions are applicable.

COLERIDGE, J.—These cases have been followed ever since, by inveterate

(a) 2 Saund. 120.

(b) 2 Mod. 71.

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practice, and we cannot, after so long a period has elapsed, now overrule them.

Judgment for plaintiff.

HAINÉ v. DAVEY and another.

1. In trespass against overseers for taking goods as a distress for a poor's rate; a defence that the goods were not the property of the plaintiff may be given in evidence under the general issue, notwithstanding the new rules.

2. So it seems might any matter of defence.

3. No new trial will be granted on the ground that the verdict was against evidence, where the subject-matter of the action appears on the evidence to be less than 20*l.*, even where the verdict has been found for the defendant.

TRESPASS, for seizing and taking a horse, harness, and divers goods and chattels of the plaintiff. *Plea*, not guilty. At the trial before *Gurney*, B. at the last Spring Assizes for the county of *Cornwall*, it appeared that the plaintiff had purchased the property at a sheriff's sale, under a writ of *feri facias* issued against one *Reed*, of the parish of *St. Neot's*, and that the defendants were overseers of that parish, and took the goods in question as a distress for a poor-rate due from *Reed*. Evidence was tendered by the defendants that the sale was invalid, by reason of the execution being collusively put in by a relation of *Reed's* for the purpose of defrauding his creditors. It was objected that this evidence could not be properly received, since the new rules, under the plea of the general issue; but the learned Judge thinking otherwise, received the evidence, and left the question of collusive sale to the jury, who found a verdict for the defendants. The value of the goods claimed appeared on the evidence to be 18*l.* A rule was obtained for a new trial, on the ground of misdirection, and that the verdict was against evidence.

Bompas, Serjt. and *W. M. Manning*, showed cause.—The defendants were entitled to give the evidence in question under the general issue, by virtue of the 43d *Eliz.* c. 2, s. 19. That statute allows special matter to be given in evidence under the general issue, in an action of trespass for a distress taken for a poor's rate. In 3 & 4 *Will.* 4, c. 42, s. 1, which is the statute under which the new rules were made, it is expressly provided, that the rules are not to have the effect of depriving a party of that right, to give special matter in evidence under the general issue, which by virtue of any Act of Parliament he had before possessed. The argument used on obtaining the rule was, that although the defendants might give in evidence any matter which related to the defendants' character, by virtue of the statute 43d *Eliz.* c. 2, s. 19, yet that they could not, since the new rules, give in evidence any matter which went to disprove the title of the plaintiff to the goods; that the latter was a matter which by the old rules of pleading, and by the common law, overseers had the power of putting in issue by the general issue, in common with the rest of the world, and that they did not derive that power from the statute: and that the provision in the Act of 3 & 4 *Will.* 4, applied only to such matters as were by statute permitted to be given in evidence under the general issue, and not to such matters as might be given in evidence on that issue at common law. But the words of the statute are general; and there is no such distinction as that contended for. Then, as to the ground that the verdict was against evidence, the rule cannot be maintained, because the subject-matter of the action appeared on the evidence to be less than 20*l.*; and the circumstance, that in this case the verdict was found for the defendants, makes no difference. The ordinary rule of practice applies.

Erle and *Butt* in support of the rule.—They abandoned the first point; but contended that the rule of practice as not to granting a new trial where the subject-matter of the action was under 20*l.*, does not apply to cases where the verdict is found for the defendant. [*Coleridge, J.*—When the objection to the verdict is, that it is against evidence, the rule applies equally, whether the verdict be found for the plaintiff, or for the defendant. *Lord Denman, C. J.*—Certainly it does.]

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LORD DENMAN, C. J.—On the first point, I think the learned Judge was quite right in receiving the evidence in question. The defendants were undoubtedly entitled, under the provisions of the statutes in question, to give their whole defence in evidence under the general issue.

LITLEDALE, J. concurred.

PATTESON, J.—I am of the same opinion. There is no doubt that the evidence in question was admissible under the general issue. I think every matter of defence may be so given in evidence, not only under this statute, —the words of which are very strong,—but also, wherever in any statute it is said that the defence may be gone into under the general issue.

COLERIDGE, J.—I did entertain considerable doubts upon the question. They have now, however, been removed. At the same time, I think it better to rest my decision on the words of the statute, and not on the ground taken by my brother *Patteson*, though I confess that he is more likely to be right than I am.

Rule discharged on those points, but made absolute on another.

OWEN and WISH v. BODY and GRIFFITHS.

FEIGNED issue under the Interpleader Act, on the application of the Sheriff of *Devon*, to try the validity of a deed of assignment of property for the benefit of creditors, made by a person of the name of *J. Marchetti*, as against two writs of *fi. fa.* issued at the suit of *Body* and of *Griffiths*. The deed bore date 6th *November*, 1834, and after reciting that *Marchetti* had for several years past carried on the trade and business of an innkeeper and lodging-house keeper at *Torquay*; that several actions had been lately commenced, and judgments obtained against *Marchetti*, and writs of *fi. fa.* issued, and which were then in process of execution against his goods and chattels; and also, that *Marchetti* was unable to pay off the said debts, and had applied to the plaintiffs to pay off the same, &c.; witnessed, that for the considerations therein mentioned he, *Marchetti*, did grant, bargain, sell, assign, transfer, and deliver unto *Owen* and *Wish*, all

1. An innkeeper being indebted to several persons, made two of his creditors trustees, and conveyed all his estate and effects to them, in trust, "to sell when they should think proper and advantageous;" and upon trust, so long as they should think it desirable and advantageous, to continue and carry on the business, and pay and apply the monies

arising therefrom, 1st, in payment of the charges of the deed; 2dly, in reduction or payment of their own debts; and 3dly, in payment of any expenses necessary for carrying on the business, and the surplus unto and amongst themselves and all other creditors who should execute the deed within three months:—*Held*, that this deed was void, as it contained such an imposition of terms as no creditor was bound to submit to.

2. *Seemle*, that such creditors as did come in and execute would be partners, and subject to the bankrupt laws.

3. At the time the deed was executed the trader had omitted to renew his expired annual wine, beer, and spirit licences, but at the next first opportunity they were renewed by the trustees:—*Held*, that this circumstance formed no objection to the deed, on the ground that it was an assignment to persons to carry on an illegal trade.

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and singular the leasehold estate, household goods and furniture, stock in trade, debts, sums of money, and other goods, chattels, real and personal, personal estate and effects, &c. with full power to enter upon the dwelling-house and other premises of *Marchetti*, &c. to hold upon trust, when they should think most proper and advantageous to sell, &c. And upon further trust, so long as they should think it desirable and advantageous to continue and carry on the business of *Marchetti*, in and upon the said dwelling-house and premises, in their or his names or name, and to pay and apply the monies arising, in the first place, towards the paying off the charges of the deed, and of carrying the trusts thereof into execution; and, in the next place, to pay and retain unto themselves the sum of 155*l.* 17*s.* 5*d.* (the sum advanced by them,) with interest; and in the next place, to pay and satisfy all such sums of money as in their judgment should be necessary to be paid, laid out, or expended, for rent, taxes, wages, insurances, or otherwise, in the continuing and carrying on the business of *Marchetti*, and in maintaining and keeping up his stock in trade, by purchasing horses, carriages, and other articles and things, and to pay the surplus of such money so to arise and be received as aforesaid, unto and amongst themselves, the said *Owen* and *Wish*, and all other the creditors of *Marchetti* who should have executed those presents within three months from the date, rateably and proportionably according to the amount of their respective debts, when and so often as there should be sufficient money in the hands of the said *Owen* and *Wish* to pay 2*s.* in the pound, upon or in respect of the said debts, or as often as thereunto requested in writing by the major part in value of the said creditors, parties to the deed. The surplus, if any, to *Marchetti*. The deed was executed by *Marchetti* and by *Owen* and *Wish*, and by three creditors, as parties of the third part. The writ of *fi. fa.* sued out by *Body* was received by the sheriff on the 29th November, 1834, and the goods of *Marchetti* were seized under it, when a person was in possession under the deed of assignment. The writ of *Griffiths* was received by the sheriff on the 27th December, in the same year. At the trial before *Patteson, J.* at the Devon Spring Assizes, 1835, it appeared that *Marchetti*, an hotel-keeper at *Torquay*, being in difficulties, executed the deed; that at the time when the deed was executed *Marchetti* had not renewed his expired licences, but that at the first session held for the transfer of victuallers' licences, after the date of the deed, the licence of the inn at *Torquay*, kept by *Marchetti*, was transferred to *Owen* and *Wish*. They, however, never took actual possession themselves, but had been in possession and carried on the business through *William Bentick*, from the time when the deed was executed. A verdict having been found for the plaintiffs, with leave to move, a rule was accordingly obtained.

Crowder showed cause.—He contended that the deed was not invalid on the ground of fraud, nor under the 13 *Eliz. c. 5*, on the ground of fraudulent preference. On this point he cited *Holbird v. Anderson* (a), and *Pickstock v. Lyster* (b). He also insisted that there was nothing to invalidate the deed in the fact, that as *Marchetti's* licences had expired, the carrying on the business was illegal; because the neglect to renew the licences merely subjected the party to a penalty for selling wine, beer, or spirits without.

(a) 5 Term Rep. 235.

(b) 3 Maule & Selw. 371.

Erle and R. V. Richards, contra.—They contended that the deed was void, and on the first point was distinguishable from any deed in any of the cases upon the subject, because the trustees were not to apply the interest and profits of the business to payment of any part of the debts. The deed was evidently made to give time to *Marchetti*, and the effect of it was to screen the goods of *Marchetti* from an execution at the suit of any of the creditors who did not choose to come in. They said, also, that the deed was void, because the nature of the clause for carrying on the business was such, that any one who was a creditor, if he should sign the deed, would become a partner in the concern, and liable to any persons supplying goods, and would also be subject to the bankrupt laws. They also contended, that as there were no licences, the trade was altogether illegal; and cited *Forster v. Taylor (a)*, to show that the sale of what is forbidden by law, is void.

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Lord DENMAN, C. J.—If either of the points which have been taken is good, the defendants will be entitled to our judgment. I see nothing, however, in the objection, that by this deed an assignment was made to persons to carry on an illegal trade: there is nothing whatever in the deed which binds the parties to carry on an illegal trade. On the other point we shall take time to consider.

Cur. adv. vult.

Lord DENMAN, C. J. afterwards (5th May) gave judgment on that point. The question is, whether the assignment by *Marchetti* to the trustees was a valid assignment. On consideration of the reasons urged in argument by the counsel for the defendants, we think that it was not a valid assignment. It contains such an imposition of terms as no creditor was bound to submit to; the rule therefore must be made absolute.

Rule absolute.

(a) 5 Barn. & Adol. 887.

HOUGH and others v. MAY.

ASSUMPSIT, for work and labour, and on an account stated. *Pleas*: First, *non assumpsit*. Secondly, as to 8*l.* 11*s.* parcel, &c. payment and acceptance of that sum in satisfaction and discharge of that sum, parcel, &c. *Replication*: that the defendant did not pay the said sum of money in the plea mentioned, in discharge of the said sum of 8*l.* 11*s.*, in manner and form as in the plea alleged. At the trial before the Under-Sheriff of *Middlesex*, it appeared that the plaintiffs' account amounted to 8*l.* 18*s.*, and that several applications had been made to the defendant for payment. On the 7th Nov. the defendant sent a check in the following form to the plaintiffs.

Messrs. Dorein and Co. 7th November, 1835.
Pay Messrs. Hough and Co. balance account railing, or bearer, 8*l.* 11*s.*
£8 : 11*s.* William May.

1. On an issue of payment of a sum of money in discharge, evidence was received of a check having been sent by the defendant to the plaintiff for the amount, but describing it as a balance:—*Held*, that the question was properly put to the jury to say whether the check was received as money; and the jury having found that it was not, the Court refused a new trial.

2. To make a check amount to a payment, it must be unconditional.

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MAY.

On the 13th, the plaintiffs' attorney wrote a letter to the defendant, informing him that the check was lying at his office uncashed, and the defendant might have it back. The under-sheriff left it to the jury to say whether the check was received as payment of the 8*l.* 11*s.* The jury found their verdict for the plaintiffs for 8*l.* 18*s.*, saying that the check was not received as money; and leave was reserved to the defendant to move to reduce the verdict to 7*s.*, if the Court considered that the check operated as payment. A rule was accordingly obtained.

Petersdorff showed cause.

Ellis, in support of the rule. *Pearce v. Davis* (a), and *Boswell v. Smith* (b), were cited.

LORD DENMAN, C.J.—There really is no doubt upon the matter. The question at issue is, whether the plaintiffs have been paid to the amount of 8*l.* 11*s.* The check of itself could not be any payment; it must either have been accepted at the time as money by the party taking it, or it must have been afterwards paid. Besides, this was a conditional check for the payment as a balance, and on that account could not be a payment, for the party was not on that account bound to receive it.

LITLEDALE, J. concurred.

PATTESON, J.—The rule must be discharged on both grounds.

COLERIDGE, J. also concurred.

Rule discharged.

(a) 1 Mood. & Rob. 365.

(b) 6 Car. & Payne, 63.

GUEST v. ELWES.

The declaration in an action for an escape, contained only one count, alleging an escape, against the Sheriff. The evidence proved a negligent omission by the sheriff's officer to make the arrest when he had it in his power to do so. The judge was applied to to amend, but refused to do so. He left the question of a negligent omission to the jury, who found generally for the defendant, and that fact in the affirmative; and the special finding was indorsed on the record:—*Held*, that the plaintiff was entitled to have a judgment entered according to the special finding.

CASE against the Sheriff for an escape. The declaration only contained one count, alleging an actual escape. At the trial before *Alderson*, B., at the *Gloucestershire* Summer Assizes, 1834, the evidence showed that there was a negligent omission by the sheriff's officer to make the arrest, when it was in his power to have done so. Application was made to the learned Judge to amend the declaration in accordance with the evidence, under 3 & 4 *Wm.* 4, c. 42, s. 23, but the learned Judge not thinking it a case in which he ought to amend, put the case to the jury, at the same time directing them to find a special verdict, if they thought the neglect to arrest had been made out. The jury found a verdict for the defendant, and also a special verdict in the affirmative. A rule was obtained for judgment, according to the special finding of the jury, for the plaintiff, with 30*l.* damages, the record being amended so as to charge a negligent omission to arrest.

Ludlow, Serjt. and *W. Alexander*, showed cause (a).

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Talfourd, Serjt. and *R. V. Richards*, in support of the rule.

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LORD DENMAN, C. J., in this term (6th *May*) delivered judgment.—This was an application to the Court to enter judgment, according to the very right and justice of the case, upon the special finding of the jury, that the defendant's officer had been guilty of neglect, in not arresting a party when he could have done so, the action being brought against the defendant as for an escape. It appeared in evidence, that the officer did not arrest the party, but that he neglected to arrest him when he had it in his power to do so. The Judge was applied to to amend, which application was refused; but the Judge left the question to the jury, whether the defendant had omitted to arrest when it was in his power, and had the special finding of the jury of that fact indorsed upon the record. We are fully convinced that the defendant experienced no inconvenience whatever from the course pursued by the plaintiff, and that he was not at all prejudiced in the conduct of his defence. We do think, therefore, that the plaintiff is entitled to have his rule made absolute. Much doubt has been entertained by the Court, as to whether they should not make this rule absolute upon some terms; but, on reference to the statute, it is clear that we have no power under the statute to impose any terms. In the exercise of his discretion, the learned Judge, at the trial, has permitted the special finding of the jury to be indorsed upon the record, and the Court will follow up that discretion, by entering judgment accordingly. Judgment will therefore be given for the plaintiff.

Rule absolute.

(a) In *Hilary Term*.

In re **JAMIESON** and others.

IN an arbitration, the submission was of the matters in difference between the parties "to the award of two arbitrators, or of such other as they the arbitrators should, before entering upon the reference, by a memorandum in writing under their hands, to be upon the submission indorsed, nominate, and appoint as an umpire in that behalf," "so as the award of the arbitrators should be made in writing, ready to be delivered" on or before a certain day. "And in case the arbitrators should not make such their award within the time, that the parties would abide by and observe the award of such person as they the said arbitrators should, in manner aforesaid, nominate, elect, and appoint as umpire." The arbitrators were not able to agree upon an umpire. They agreed that each should put down on a separate piece of paper the names of any four persons he pleased, and that they

1. An umpire was appointed by lot, in consequence of an agreement by the arbitrators. This was not known or assented to by the parties, but was known to the attorney of the party applying to set aside the award. When, however, the umpire was so appointed, he was specially objected to by the arbitrator appointed by that

party; and that fact was not known to the attorney:—*Held*, that there was not a sufficient assent to the mode of appointment, because the whole facts were not within the knowledge of the party assenting; and consequently, that an award made by an umpire so appointed, was bad.

2. *Quære*, whether the attorney had power to bind his client by such an assent.

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each should be permitted to strike off one of such names, and that they should toss up for the choice of the umpire out of those remaining. This was done, and the umpire who made the award was nominated umpire in that way: but, when it was done, he was specially objected to by the arbitrator who was appointed on behalf of *Jamieson*. The course pursued was entirely without the assent or knowledge of *Jamieson*, but Mr. *Earl*, the attorney appointed by him to attend the reference, and who did attend the whole proceeding, had a knowledge previously of the way in which the umpire was appointed, though he was not aware that he had been objected to by the arbitrator of his client. A rule was obtained for setting aside the award, on the ground that the appointment of the umpire was illegal.

The *Attorney-General* and *W. H. Watson*, showed cause.—The doctrine, that the appointment of an umpire by chance is bad, as laid down in *Ford v. Jones* (a), has been qualified *In re Tunno and Bird* (b). In that case it was held, that such an appointment was good, if known to and acquiesced in by the parties. Here the fact was known to Mr. *Earl* the attorney of *Jamieson*, who attended the whole proceeding; and was therefore equivalent to a knowledge and acquiescence by *Jamieson* himself. In the case of *In re Hick* (c), it was held, that an attendance on an irregular proceeding in an arbitration, with knowledge of the facts, amounted to a consent.

Sir *W. Follett* and *Hoggins*, in support of the rule, relied on the fact, that *Earl* had no knowledge that the umpire appointed had been expressly objected to by *Jamieson's* arbitrator. They also contended, that the knowledge and implied assent of *Earl* to the proceeding could not be binding on *Jamieson*, because he was merely appointed to attend the reference as an agent, and had no authority to bind his principal in the manner contended for.

LORD DENMAN, C. J.—It is certainly not desirable that the choice of an umpire should ever depend, in any degree, upon chance: but if two parties are proposed, and the arbitrators choose one by lot, and that is known to the parties, and they consent to the appointment being made in that way, I cannot see any thing to make void an award made by an umpire so appointed. In the case of *In re Tunno and Bird*, an award was set up notwithstanding this objection, because both parties were fully aware of the course which had been pursued. In the present case, however, it is a very important fact, that *Jamieson* himself had no knowledge whatever of the way in which the appointment had been made; and that a very material circumstance was kept from the knowledge of Mr. *Earl* the attorney, who attended the reference for him, even if the assent of the attorney to the proceeding would have been sufficient. If that circumstance had been known to Mr. *Earl*, the question might have been raised, whether he could, in such a case, have bound his principal. Under all the circumstances the award was bad; and the rule must be made absolute.

LITTLEDALE, J.—I am of the same opinion.

(a) 2 Barn. & Adol. 248.

(b) 5 Barn. & Adol. 488.

(c) 8 Taunt. 694.

PATTESON, J.—I thought that the case of *In re Tunno and Bird* had settled this question, but it seems that it has not. An appointment made as this was, may be rendered valid by assent; but then such assent can only be with a full knowledge of all the facts; and in the present case, a very material fact was wholly unknown to the party who is alleged to have assented.

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and others.

COLERIDGE, J., concurred.

Rule absolute.

WANDSBOROUGH and another v. MATON.

TROVER for a barn by the executors of the former tenant against the owner of the freehold. *Pleas*: first, not guilty; second, that the plaintiffs were not entitled. At the trial before Gurney, B., at the Spring Assizes for Wiltshire in 1835, it appeared, that the barn in question was a wooden and thatched barn, and was what is called a staddle barn, erected on blocks of stone; some of which stood on the surface of the soil, some a few inches in the ground, and others on a foundation of bricks and mortar, rendered necessary by the unevenness of the ground. The whole of the timber work rested entirely on the staddles by its weight alone, and could be removed without removing the caps which were affixed to the staddles by mortar. The learned judge thought that the barn was a chattel which might be removed by the tenant, but he reserved the point. A verdict was found for the plaintiff. A rule for a nonsuit was accordingly obtained.

A barn of wood, and thatched, was erected by a tenant on staddles, or blocks of stone with caps, some of which stood on the surface of the soil, some a few inches in the ground, and others on a foundation of brick and mortar, rendered necessary by the unevenness of the ground. The whole of the timber-work rested entirely on the staddles by its weight alone, and could be removed without removing the caps which were affixed to the staddles by mortar:—*Held*, that the wood-work and thatch of such a barn was not affixed to the freehold, but was a chattel, for which trover might be maintained.

Erle showed cause. He cited *Amos and Ferrard on Fixtures (a)*, *Culling v. Tuffnall (b)*, *Davis v. Jones (c)*, and *Penton v. Robart (d)*.

Merewether, Serjt. and *W. M. Manning*, in support of the rule, relied on *Elwes v. Maw (e)*, and distinguished the cases cited against the rule.

PATTESON, J., in the course of the argument, referred to the case of *Rex v. Otley (f)*, in which a pauper rented a windmill, and a brick cottage and garden, at the rent of 30*l. per annum*, for six years, and during that time held and occupied the same, and actually paid that rent. The cottage and garden, with the mill, were together of more than the annual value of 10*l.*; but, exclusive of the mill, they were not of that annual value. The mill was of wood, and had a foundation of brick; but the wood-work was not inserted in the brick foundation, but rested upon it by its own weight alone. No part of the machinery of the mill touched the ground, or any part of the foundation. It was held, that the windmill not being affixed to the freehold, nor to any thing connected with it, was not parcel of a tenement, and consequently that there was no settlement gained.

Lord DENMAN, C. J.—It is impossible to lay down a general rule which

(a) Page 2.

(b) Bul. N. P. 34.

(c) 2 Barn. & Ald. 165.

(d) 2 East, 88.

(e) 3 East, 38.

(f) 1 Barn. & Adol. 16.

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can be applicable to all cases, and not liable to distinctions arising from the particular circumstances of each case. The question is, whether this barn is a part of the freehold. It does not appear to me that we can properly consider that it is. It is a mere chattel placed on the freehold, and removeable without injury to it. Were we to hold otherwise, indeed, we must overrule the case of *Rex v. Otley*, which appears to me to be an authority.

LITLEDAL, J.—The tenant may have done wrong in first removing the soil to place the saddles on which this barn stood, and may have subjected himself to an action by that act; but whatever may have been the legal consequence of such an act, that is not the question now. Here there was nothing whatever to fix the wooden barn to the freehold, and there was no need of disturbing any portion of the soil in order to take the wooden building away. If the tenant had made holes in the brick-work, and the wooden building had been let into the brick-work, it is not necessary to say how far he might not have been entitled to remove it. That, however, is not the case in the present instance. The building merely rested upon the brick-work.

PATTESON, J.—I am unable to distinguish the present from the case of *Rex v. Otley*, in which the point in question was expressly decided. In that case the wooden mill rested upon brick-work, but was not inserted in the brick foundation. The Court there held, that the mill was not to be considered as part of the tenement for the purposes of conferring a settlement. That is a very strong case, inasmuch as the whole mill and ground itself were the subject-matter of demise to the pauper as one tenement.

COLERIDGE, J.—By law, in the absence of any custom or exemption in favour of trade, a tenant is not entitled to remove any building which may have been affixed to the freehold by him. Whether a building is such as, in point of law, is to be considered affixed to the freehold, is a question depending on the facts of the case. In this case I do not consider any thing but the wood-work as constituting the barn. I think that the barn consisted of the wood-work, and of that alone. If so, it was not affixed to the freehold, and the plaintiffs are entitled to keep their verdict.

Rule discharged.

RHODES v. OLIVER and another.

A prohibition lies to an Ecclesiastical Court, where the question of custom or no custom is distinctly raised on the face of the libel and answer.

PROHIBITION. The defendants were churchwardens of *Moltram*, where disputes had arisen respecting the church-rates. The parish was composed of eight different townships. The defendants were libelled in the Spiritual Court, and it was alleged that there was a custom to charge the different townships in separate proportions. The answer denied the custom, the making of the rate, the election of the churchwardens, and every fact stated in the libel. A rule for a prohibition had been obtained, on the ground that the Ecclesiastical Court could not decide on the facts put in issue on the face of the libel and the answer.

Starkie showed cause.—There is nothing which should prevent the Eccle-

siastical Court from proceeding in this case. In *The Churchwardens of Market Bosworth v. The Rector of Market Bosworth* (a), the libel stated, that there was from time whereof &c., and is a chapel of ease within the parish; that the rector of the said parish, from time whereof &c., hath repaired, and ought to repair the chancel of the said chapel, and that the chancel being out of repair, the rector hath not repaired it. The defendant denied the custom. A prohibition was applied for and refused, and the judgment of the Ecclesiastical Court was enforced. In *Comyns' Digest* (b), it is said, that a prohibition will lie if the Ecclesiastical Court proceeds to the trial of a matter of fact, for to that it is not competent. But custom or no custom is not a matter of fact, but of law. In *Jeffrey's* case (c), this Court took the opinion of the Spiritual Court as to whether *Jeffrey* was by law a parishioner of *Haylesham* for the purpose of the reparation of the church.

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J. Jervis in support of the rule.—The custom, the mode of rating, and the fact that the rate has been made substantively, as alleged in the libel, are all denied by the answer. The very origin of the custom is denied, for the existence of the church before the time of legal memory is distinctly put in issue. The question, therefore, raised on the libel and answer is, what period can be said to be the period of legal memory? Now that is a question which this Court will not permit the Ecclesiastical Court to decide, for the Ecclesiastical Court would fix one period, and the common law another. The question can therefore only be tried in a Common Law Court. The case in *Lord Raymond* is an authority in favour of this application, for there the principle now stated was distinctly recognized; but it was said that the Ecclesiastical Court having already found against the custom, there was no danger from the Ecclesiastical Court in that case allowing a custom which the common law would disallow.

Lord DENMAN, C. J.—This seems the very case in which the Court below ought not to be permitted to proceed. The principle on which the Courts of Common Law have acted in questions like the present, has been, that the Ecclesiastical Courts are not to be allowed to set up one period of prescription, when the Courts of Common Law will only recognise another. There is nothing here to show that the Ecclesiastical Court would not adopt a rule of prescription different from that which is allowed at Common Law. The principle of the case of *The Churchwardens of Market Bosworth v. The Rector of Market Bosworth* (a), is in favour of this application. The prohibition must go.

Per Curiam.—

Rule absolute.

(a) 1 Lord Raym. 435.
 (b) Tit. Prohibition (F 14.)

(c) 5 Co. Rep. 67.

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WALLIS and another v. BROADBENT and another.

In *assumpsit*, the declaration stated the terms of a certain agreement of demise between A. and the defendants, that A. afterwards died, and plaintiffs entered into possession: that defendants, in consideration that plaintiffs would permit them to hold and enjoy the premises, agreed to perform the conditions then agreed upon, and also the conditions according to the tenor and effect of the first agreement. *Allegation*, that defendants did hold, &c. *Breach*, non-performance of the conditions. *Plea*, general issue:—*Held*, that upon this record the plaintiffs were bound to show what the conditions in the first agreement were, and not being able to do so, were rightly nonsuited.

ASSUMPSIT. The declaration stated, that one *Elizabeth Eldridge*, in her life-time, was seised of the premises in the declaration mentioned, and on the 1st *November*, 1820, by certain articles of agreement, agreed to demise the same to the defendants, to hold the same unto the defendants, their executors, &c., from 11th *October* then last, for the term of one whole year, at the rent of 63*l.*, on certain husbandry conditions therein mentioned; and that the said agreement should continue in force for one year more, commencing from the 11th *October* then next ensuing, and so on from year to year, so long as both parties should agree, upon the terms and conditions thereinbefore specified and contained. That the defendants entered into possession, and that *Elizabeth Eldridge* devised the said premises to the plaintiffs and died, and that plaintiffs entered into possession: that on the 11th day of *October*, 1830, in consideration that the said plaintiffs, at the request of defendants, would permit the said defendants to hold and enjoy the said messuage and premises at the yearly rent of 60*l.*, upon all other the terms and conditions therein mentioned, the defendants promised the plaintiffs to abide by, observe, and perform, all other the terms and conditions, according to the tenor and effect of the said articles of agreement. *Allegation*, that defendants did hold on such conditions until 11th *October*, 1834. *Breach*, non-performance of the said conditions. *Plea*: *non assumpsit*. At the trial at the *Lincolnshire Spring Assizes* in 1835, the agreement was offered in evidence, but rejected on the ground of not being stamped; and the plaintiffs not having given other evidence of the terms of the original agreement, they were nonsuited, on the ground that on the form of the issue, proof of the original agreement was absolutely necessary in order to sustain the action. A rule had since been obtained to set aside the nonsuit and have a new trial.

Miller now showed cause against the rule.—In order to maintain this action, it is absolutely necessary for the plaintiffs to show the terms on which the premises were originally let by Mrs. *Eldridge*. The declaration avers, that the defendants held upon the conditions contained in the original agreement. What those conditions were, became therefore at the trial a material question. There was no evidence to show what they were, for the agreement itself was rejected because it was without a stamp, and the plaintiffs had no other means of proving them. The nonsuit was perfectly right.

Humfrey and *J. Bayley*, in support of the rule.—The question as to the original agreement was not raised upon this record. The agreement as to the letting at 60*l.* a-year was an agreement made in consequence of a proposition to plough up certain lands. That agreement was made between the plaintiffs and defendants on this record, and of that agreement there was ample evidence. All that was stated in the declaration respecting the original agreement, was merely stated by way of inducement. In *Winn v. White (a)* it was held, that in an action against a tenant for not performing

(a) Sir W. Black. 840.

his agreement, the estate of the lessor is an immaterial averment, if the tenant has had the fruit of his lease. All the terms and conditions here are merely stated by way of inducement.—[Lord Denman, C. J.—It is rather more than inducement when the terms and conditions are stated in this way.]—The plea here does not put the introductory part of the declaration in issue. In *Jones v. Brown* (a) the defendants, after alleging that *M.* had been declared a bankrupt, and that they had been appointed his assignees, justified taking the goods as belonging to them in that capacity. Plaintiff replied, that the goods belonged to him and not to the defendants, and it was held, that upon this issue it was not incumbent on the defendants to give formal proof of *M.*'s bankruptcy and of their appointment as his assignees. The case of *Barnett v. Glossop* (b) is an answer to the present rule. There it was held, that in *assumpsit* for the price of a copyright bargained and sold, a defence, on the ground that the copyright was not assigned in writing, must be specially pleaded. Lord Chief Justice Tindal there said, "This is not a denial in fact of the existence of the contract, but a claim to be discharged from it, because the formalities which the law has prescribed have not been observed." The principle of that case is fully decisive of the present.

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LORD DENMAN, C. J.—It appears to me that the new rule, describing what the plea of *non assumpsit* shall not be considered to deny, does not dispense with the necessity of proving the original agreement for the premises. The declaration sets forth that the defendants agreed to perform certain covenants. To that the defendants have pleaded that they did not promise. How can the plaintiffs show that they did promise? Why, by showing that the premises were formerly let upon certain terms, and that the defendants took them from the plaintiffs upon the same terms, changing only the amount of the rent. To do this they must show what these terms were. It is not by calling this statement of the terms a statement by way of inducement, that the necessity for proving it can be prevented. The statement must refer either to the precise agreement to which the defendants were parties with *Mrs. Eldridge*, or to the present agreement with the plaintiffs, which embodies the former; and in either case, the plea of *non assumpsit* amounts to a denial of the agreement.

LITLEDALE, J.—I am entirely of the same opinion. The plea of *non assumpsit* puts in issue here all the facts stated in the declaration, the agreement, and the holding. It is said, however, that according to the new rules the plea of *non assumpsit* operates only as a denial of the matter of fact—that there is no express contract here, but one implied by law, and that being implied by law, the terms must be understood to be those on which the premises were formerly held. It seems to me, that if the contract is implied by law, it must be implied to be upon the terms of the old agreement, and therefore the old agreement should be shown. There was no proof of that agreement, and therefore the nonsuit was right.

PATTESON, J.—I think that the nonsuit was right on the particular evidence

(a) 1 Bing. N. R. 484.

(b) 1 Bing. N. R. 633.

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in this case. Here is an allegation of an express contract, but there is no evidence of an express contract at all, and therefore the plaintiff has been nonsuited on the issue of *non assumpsit*. The only evidence here was, that there had been an old holding from some person or other at a rent of 63*l.* a-year, and that 60*l.* a-year had been afterwards received as the rent. There is no evidence, however, of the agreement under which the 60*l.* came to be received. There is evidence, that when that had been received, an application was made by the defendants to be allowed to plough up certain lands, and it was agreed that they should be allowed to do so on the payment of 5*l.* a-year more rent, but not one word was said at that time about any thing else. The contract proceeded on in this declaration is the contract on this change of the situation of landlord. They cannot go on that contract without evidence of the express agreement between the parties. The plaintiffs are obliged to rely on the implied contract. Then the *non assumpsit* denies all the matters of fact from which the implied contract may be implied by law. If so, then it is necessary for the plaintiffs to prove the original terms of the holding, and the transfer of the tenancy, and that the defendants continued to hold the premises with the exception of the mere change in the amount of the rent, upon all the old terms of the original agreement. This is like the common case of a lease for seven years, at the expiration of which the tenant holds on, and where the acceptance of rent afterwards implies a continuance of the tenancy upon the old terms. If the plaintiffs rely upon that, they must prove what the old contract was. I do not mean to say, that if upon this declaration there had been proof of the express contract in so many words that the defendants should hold the premises at a rent of 60*l.* a year on the terms of the old agreement, that that would not have been sufficient to maintain this action. I incline to think that it would, but that is not the case here, and, under the circumstances here, I think that the nonsuit was right.

COLERIDGE, J.—I am of the same opinion, and for the same reasons. The distinction in all these cases is to be inferred from the circumstances of the declaration, and the necessity of there being an express statement of the terms of the agreement. If there had been an express promise to hold by the terms of the original instrument, the mere production of that instrument might have been sufficient to maintain the action. I do not say whether it would or not, but here there was not that proof, and the plaintiffs only inferred an agreement of that sort from the circumstances of the continued holding. I do not think that from that circumstance alone, under the peculiar facts of this case, the jury would have been warranted in drawing the inference which they required. There are other objections in this case, but it is not necessary to state them.

Rule discharged.

JONES v. SHEARS and three others.

ASSUMPSIT, to recover 400*l.* for sleeping rent, on an agreement for a lease of a coal mine, the coal in the mine not being fairly worked out. *Second plea* : that the defendants, in accordance with a power given to them for that purpose by the agreement, had given notice, during the continuance of the term, to wit, on the 24th *April*, 1829, of their intention to put an end to the term at the expiration of two years from the time of giving the notice. *Replication* : that the defendants, after giving the notice, abandoned such notice, and then assented and agreed to a continuance of the said term, and of their tenancy to the plaintiff. Issue thereon.

At the trial of the cause before *Coleridge, J.* at the last assizes for *Car-marthen*, it appeared that the defendants, the parties constituting the *Llangennech* Coal Company, became tenants to the plaintiff, under an agreement to grant them a lease of all the coal under certain tenements called *Caenwydd* and *Caergorse*, in the parish of *Llangennech*, with a power in the defendants to put an end to the term by two years' notice. On 1st *April*, 1829, notice was given by the defendants that they should deliver up possession at the expiration of two years from the date of that notice. It appeared that the defendants continued to work the coal under *Caenwydd* until the 24th *June* following. The evidence as to the mode of working mines, showed, that as the tenants proceeded, they usually left pillars standing to support the upper surface ; and that it was the custom for the tenants to cut away as much of such pillars as they could, with safety, on leaving the mine. The only work which the defendants did in the mine after the expiration of the notice, was to remove some of the coals from several of these pillars. In order to show the intention of the defendants to hold over after the term, in the capacity of tenants, a letter of the 16th *July*, 1835, signed by a *Mr. Seymour*, was tendered in evidence. It appeared that he was agent to the *Llangennech* Coal Company, and had been so about eighteen months ; that the company carried on, during that period, the same works as before ; and the witness, examined as to this matter, said, that he was not aware of any change in the names of the firm. The company might not consist of the same parties as it did at the time of the notice, but it was proved that two of the defendants were members at the time of the date of *Seymour's* letter. The learned Judge thought that there was not sufficient evidence to constitute *Seymour* the agent of the four defendants ; and he left it to the jury to say, whether the taking away portions of the pillars by the defendants was done with the intention of clearing the work already completed, or with the intention of continuing working. If the jury should be of the latter opinion, they would find for the plaintiff ; but, if they thought that the work referred to had been done with the intention solely of completing what had been begun, they would find a verdict for the defendants. The jury found a verdict for the defendants.

1. Whether a party who formerly held under a lease holds over, and continues tenant or not, is a question of fact for a jury.

2. The letters of a person who in one year acted as the agent of a company, are not evidence to affect other persons who were members of that company in the preceding year, but who were not proved to be members of it at the time when the letters were written.

Wilson moved to set aside this verdict and have a new trial, on the ground of misdirection and rejection of evidence. When a party holds over

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after the expiration of a lease, whether that lease has expired by efflux of time, or in consequence of any collateral matter, the holding over is matter of law, and should not be left to a jury as a question of intention. In *Digby v. Atkinson* (a), it was so treated by Lord *Ellenborough*, and the verdict in that case was given under his direction. In *Right d. Flower v. Darby* (b), Lord *Mansfield* said, "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract." It is so here, and was therefore not matter for the consideration of the jury, but of the Judge. [*Littledale, J.*—The mere fact of entry by a party who claimed a right to enter for a particular purpose, would not make him a tenant.] The acts of ownership exercised here, are such as cannot be qualified by any claim of right for a particular purpose. The intention of the landlord, and not of the tenant, must be taken into consideration, to determine the question whether the tenancy continues. Then as to the rejection of evidence: for the purpose of showing what was the intention of the holding over, a letter, signed by a Mr. *Seymour*, was offered in evidence, and the question was, whether he was sufficiently the agent of the defendants, to make the letter written by him evidence against them; he was their agent; the parties giving notice to quit were the members of the company. The notice was served on the 24th *April*, but the company remained in possession from the 24th *April* to the 30th *June*, beyond the period of the two years stated in the notice. It was said that the company was not formed of the same persons, when the notice was served, and when the action was brought; but it was proved that two of the present defendants were members of the company at that time; that was sufficient to justify the admission against the defendants, of a letter written by the agent of the company.

Lord DENMAN, C. J.—I am of opinion that there is no ground for disturbing this verdict. It was impossible not to leave it to the jury on the issue which was upon this record, whether there was any waiver of the notice or not. The jury must decide upon all the circumstances before them, whether the defendants continuing their working in the mine was with the intention of clearing the work, or with the intention of going on as before as tenants. Whether the parties meant to be tenants or not, is certainly a question of evidence, of which the jury alone could be the proper judges. With regard to the point upon the rejection of evidence, the notice signed by the four defendants was in 1829, and they ceased to work in 1831. *Seymour* was the agent of the company in the year 1835, that is, of the present company. Without proof that the present company consists of the same persons as they did in 1831, his letter is not admissible against them. Though he is agent for the company for all the purposes for which they employ him, that is to say, during the time of his employment, he is so only in respect of those who are the members of the company, and he is not the agent of all the members of the company for all time. The rejection of this evidence was quite correct.

LITTEDALE, J.—I am of the same opinion: after the expiration of the

(a) 4 Camp. 275.

(b) 1 Term Rep. 159.

tenancy, whether the tenant holds over under the same terms as before or not, is a matter of law for the Judge to decide, and, generally speaking, he does decide it, but he is not necessarily bound to do so. If the tenant holds under a lease, and holds over after the expiration of the term, the law generally implies that he holds over upon the same terms as are contained in the original lease; and, generally speaking, there is no doubt that he does hold over on the same terms. In the case cited from *Campbell*, the rent was raised and some other particulars had been changed on the holding over; and there Lord *Ellenborough* thought that the change of rent did not do away with the covenant to repair. But suppose most of the covenants to be changed, I do not apprehend that it is a necessary inference of law, that if part of the agreement is changed, all the rest is changed also. But here the question was not upon what terms the defendants held over, but whether they held over at all. The question was, for what purpose they continued in possession, and that is a question to be inquired into and decided by a jury. The mode in which they exercised acts of ownership in the mine was fairly left to the jury, for them to say whether those acts were done with the intention of continuing the works or not. On the issue joined here, the question was, whether the defendants had waived the notice to quit, and had by their conduct agreed to continue, and whether they had exercised acts of ownership over the property; surely all these were questions of fact for the jury. Then with regard to the letter: the notice was given in 1829 to quit in 1831, and up to that time the defendants continued members of the company; but subsequently there was a new firm, and *Seymour* became the agent to the new firm; two of the members of the old firm then went out, he could not be agent for that old firm, yet still it is said, that as two of them remained, he can by his acts bind all the four: I do not know that that follows. The firm is carried on in the same name, but it may be composed of different members, and the agent of the company at the present time has no right to bind all the members constituting the firm at a former period.

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PATTESON, J.—This is an action to recover sleeping rent, on an agreement entered into between four defendants. The defendants have pleaded, that they gave a notice in 1829, determining the tenancy under that agreement, and the plaintiff has replied to that, a waiver of the notice, and the question arises upon the evidence given on this issue on the record. It is contended, on the part of the plaintiff, that the mere fact of the defendants being proved to have taken away coals from the mine after the notice had expired, made it necessary for the Judge to say that that was conclusive to show that there had been a waiver of the notice, and that they were so working the mine as tenants. I do not find any authority requiring him to say so. The authority cited may appear to establish this doctrine, that where there is in fact a continuance of the tenancy after the expiration of a lease, the parties holding over must be considered as holding under the terms of the old lease; but the question whether the parties continued in possession as tenants, must be a question for the jury, to be determined from the circumstances under which they did continue in possession. It might have been under some supposed right, or it might have been that they knew themselves trespassers, but chose to continue notwithstanding. In this case

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it appeared that the mode of working the mine was leaving a number of pillars, and the defendants appear to have considered, that according to the custom they had a right to take away part of the coal of which these pillars were composed, after the expiration of the lease, in the same way as a man goes upon land to take away what he has left there in the course of his tenancy. This is matter for the consideration of the jury. It was impossible for the Judge to take upon himself to say that this conduct of the defendants was in itself a waiver of the notice to quit. With respect to the rejection of the letter, it appears clearly that *Seymour* never was the agent of the four defendants under this agreement, for he did not become their agent until 1832: how then can an agent of a company, working some other place, be the agent of the four defendants, who had not before worked that place? It is not proved that all the four defendants were at the time of *Seymour's* letter members of the company, and consequently, though he might be the agent of the company, he was not their agent, and his acts will not bind them. On both grounds the verdict is right.

COLERIDGE, J., concurred.

Rule refused.

LEWIS v. Lady PARKER.

Where, in an action on a bill of exchange, the plea shows the bill to have been an accommodation bill, but does not show fraud in its inception, a plaintiff is not bound to begin by going into proof of consideration.

ASSUMPSIT, by the indorsee against the acceptor of a bill of exchange. *First plea: non assumpsit.* *Second plea:* that one *John Miles* drew, and defendant accepted the bill, for the mere accommodation of defendant, and in order that *Miles* might get it discounted, and thereby raise money thereon for the use of defendant, and without *Miles* having given any value or consideration whatever for the defendant's accepting the same, at any time before or since; and that *Miles* afterwards indorsed the bill, without consideration, to *W. M. Elkins*, in order that *Elkins* might discount the same for the use of the defendant: that *Elkins* received the bill from *Miles* for the purpose of discounting the same, but did not at any time discount the bill or pay the defendant, or *Miles*, any sum of money whatever for or on account of the bill, nor in any other manner whatever give to the defendant or to *Miles* value or consideration, in the whole or in part, for the said bill; and, on the contrary thereof, *Elkins*, having full notice of all the premises, indorsed the bill to the plaintiff, in fraud of the defendant, and the plaintiff received the bill by indorsement from *Elkins* after it became due; and concluding with a verification. *Replication:* that *Elkins* indorsed the bill to the plaintiff before it came due and payable, the plaintiff not knowing the premises in the plea mentioned:—traversing that the plaintiff took and received the bill by indorsement from *Elkins*, after it had become due, as the defendant had alleged; and concluding to the country. Issue thereon. At the trial of the cause before *Williams, J.* the question arose upon these pleadings, as to which party was bound to begin to prove the case, and his Lordship, after recommending the plaintiff to give evidence of consideration, in the first instance, which was declined by his counsel, directed the jury, in the absence of any evidence of a contrary nature on the part of the defendant, to find a verdict for the plaintiff.

Barstow moved to set aside this verdict, and have a new trial.—The burden of proof lay upon the plaintiff. The cases of *Mills v. Barber*; *Bounsall v. Harrison*; and *Till v. Rawlings*, are all now depending in the Courts upon this single question of who is to begin in a case of this kind. In one of these cases, Lord *Abinger* nonsuited the plaintiff, because, on a replication that the bill was indorsed for value, the plaintiff did not offer evidence to support the allegation. That ruling cannot be impeached. It is true that in another case Mr. Baron *Alderson* did just the reverse, and ruled as in this case, but this last ruling cannot be supported. In *Simpson v. Clark* (a), the plaintiff did offer some evidence; he afterwards wanted to raise the question as to the person on whom the *onus* lay, but the Court would not decide it, as the plaintiff having given evidence, had prevented its decision from being a matter of necessity, but the inclination of the Court was, that the burden of proof was on the plaintiff. In *Whittaker v. Edmunds* (b), Mr. Justice *Patteson*, at *Nisi Prius*, refused to put the plaintiff upon proof of the consideration, because the defendant, the acceptor, had not shown that there was no consideration between the drawer and himself, although he proved several of the indorsements to be without consideration. When that case afterwards came before the full Court, consisting of the Lord Chief Justice, and *Littledale*, *Taunton*, and *Williams*, JJ., a rule for a new trial was refused. [*Littledale*, J.—That case differs from this, for there the only special defence was a notice to dispute the consideration, and the Courts have long held that a mere plea of want of consideration is nothing, and will not alone compel a plaintiff to go into proof of consideration.] It does so to that extent, but on that very account it is in favour of the proposition now contended for. Here the plea is more than a mere plea of want of consideration; it directs the attention of the plaintiff to the matter which he ought to prove, and by his taking issue upon it, he bound himself to prove his title to sue upon the bill. The circumstances here, too, supply the only thing that was defective in *Whittaker v. Edmunds*, for here it is shown on the plea, that there was no consideration between the drawer and acceptor. There is enough, therefore, to call on the holder to prove consideration.

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Lord DENMAN, C. J.—In cases where fraud is proved, in the inception of the bill, a suspicion is thrown upon its subsequent possession, and, in such cases, the holder must do what he can to get rid of the suspicion. That does not appear to be the case. As there is no case exactly in point, requiring us, in circumstances like the present, to compel the holder to go into proof of consideration, we think that we ought not to grant the rule.

Per Curiam.—

Rule refused.

(a) 2 Crompt. Mees. & Ros. 342; and 1 Gale, 237.
 (b) 1 Moo. & Rob. 366; and 1 Ad. & Ell. 638.

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The KING v. The Justices of STAFFORDSHIRE.

1. Where a statute gives a party the right of appealing to the Sessions, on notice being given, that Court must not impose on him any new condition of appeal not imposed by statute.

2. On an appeal to the Sessions against a church-rate, under 53 Geo. 3, c. 127, s. 7, notice of the appeal was given to one only of the two magistrates who had acted together in making the order appealed against:—*Held*, that the Sessions were wrong in refusing to hear an appeal on that ground.

RULE for a *mandamus* to be directed to the defendants, commanding them to enter continuances, and hear an appeal. A church-rate had been made; and one *Simpkinson*, a person liable to be rated, had been called upon to pay the sum of 3s. 11½d. as his proportion of the said rate. Under the 53 Geo. 3, c. 127, s. 7, he appealed against the rate. The order of justices, for the payment, was made on the 6th *April*, and the notice of respiting the order and appealing was dated on the 7th. The Sessions were appointed to be held on the 30th *June*; and on the 20th the appellant gave notice to one of the magistrates who had signed the order, and to the then existing churchwardens, that he should try the appeal. On the appeal coming on, he was called on to prove his notice; and he proved due notice upon the churchwardens, and upon one of the magistrates, but not upon the other, whereupon the Sessions refused to hear the appeal. The practice at the Sessions required seven days' notice of appeal before the General Sessions, exclusive of the day of holding the Sessions, but did not say to whom notice was to be given.

Whately showed cause. The question is, whether the rule made by the justices is a reasonable rule. There is no doubt that it is. It is reasonable that the justices who make the order should have full notice given them of the intention to dispute the order; and that notice ought to be given to each of them, that each may have an opportunity to defend his own judgment.

Wightman, in support of the rule, was stopped.

LORD DENMAN, C. J.—It seems to me that the magistrates are clearly bound to hear this appeal. The appellant has fully entitled himself to have it heard. The right to appeal is given by statute; and it is not competent for any Court of Justice to require a new condition, before allowing any of the king's subjects to come into Court to pursue a right which the law has given him. There is nothing in the statute requiring this service of notice on the two justices; but, if there was, the appellant has done sufficient to entitle himself to its benefit.

LITLEDALE, J., concurred.

PATTESON, J.—The legislature has been silent as to the time of notice, and as to the parties to whom notice is to be given. The act declares, that the party may appeal to the Sessions; he has given every reasonable notice, and he is entitled to have his appeal heard.

COLERIDGE, J.—Not only the statute, but the rule of practice, is silent as to the number of persons to whom notice is to be given. That being so, the notice is sufficient. If the magistrates act together upon a joint authority, notice to one of them is notice to both.

Rule absolute.

WISE v. CHARLETON.

ASSUMPSIT, on a promissory note by indorsee against maker. At the trial before Lord Abinger, at the last Derby Assizes, it appeared, that the action was brought on an instrument in the following form:—"On demand I promise to pay to Mr. John G. Johnson, or order, the sum of 120*l.*, with lawful interest for the same, for value received; and I have deposited in his hands title-deeds to lands purchased from the devisees of William Toplis, as a collateral security for the same." The note was indorsed by Johnson to the plaintiff. It was properly stamped with a promissory note stamp, and had also on it a mortgage stamp, which had been affixed on payment of the penalty. It was objected by the defendant, that the instrument, not being an absolute and unconditional promise to pay money, was not a promissory note, assignable under the statute; and that it was not properly stamped, because the mortgage stamp was requisite to make it producible in evidence; and that had been affixed after the instrument was complete, which, as it was a promissory note, the commissioners of stamps had no power to authorize. The learned judge overruled the objections, but reserved the points; and a verdict was found for the plaintiff.

An instrument in form, "On demand I promise to pay to J. G. J., or order, the sum of 120*l.*, with lawful interest for the same, for value received; and I have deposited in his hands title-deeds to lands purchased from the devisees of W. T., as a collateral security for the same," is a promissory note transferable by indorsement.

Whitehurst now accordingly moved for a nonsuit or for a new trial. He referred to the statutes giving power to the commissioners of stamps to impose stamps on documents, 23 *Geo.* 3, c. 49, s. 14; 31 *Geo.* 3, c. 25, s. 19; 37 *Geo.* 3, c. 136, s. 1; and 55 *Geo.* 3, c. 184, s. 8; and to the cases of *Green v. Davis* (a), and *Butts v. Swann* (b).

LORD DENMAN, C. J.—There is no doubt that this is a promissory note, and that it has a right stamp upon it. There is not any thing which qualifies it so as to take away its character as a promissory note. It is a distinct promise to pay a certain sum on demand.

LITLEDALE, J.—I am of the same opinion. There is a distinct promise by itself, absolute in the first instance, and being so, it is properly stamped as such. Then, as to the statutes authorizing the commissioners of stamps—those acts only prevent a note from being stamped after it is made, no stamp having been put upon it at the time it was made; but they do not prevent the commissioners from impressing a legal stamp upon an instrument which has already got a stamp, though a wrong one, upon it. The case of *Butts v. Swann* is quite different from the present. There it was not found that the instrument had been stamped. There was no incorporation here of any qualification upon the promise, and no difficulty arises upon that point. It is not necessary to enter upon the consideration of the question, whether it was requisite to have a stamp, as upon the assignment of a mortgage.

PATTESON, J.—This instrument is not less a promissory note because

(a) 4 Barn. & Cress. 235.

(b) 2 Brod. & Bing. 78.

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there is something else written on the same paper. The cases referred to are those where the instrument had no stamp at all. Here it had one.

COLERIDGE, J.—If it is a good promissory note, that is sufficient for this action. It is so, although there is, at the end, incorporated into it a memorandum, which, however, is no qualification of the promise. That is merely for further security. You could not say, if a man added to a clear promissory note the words, "I have given you this in payment," that that would not be a promissory note.

Rule refused.

DOE *d.* BARRON and others *v.* PURCHAS and others.

1. A docket of the issue is not a docket of the judgment, within 4 & 5 *H. & M. c.* 20, so as to give precedence to the judgment creditor over other subsequent charges on the land.

2. It is the duty of the plaintiff's attorney to see that the judgment is properly docketed.

EJECTMENT. At the trial before *Gaselee, J.*, at the Spring Assizes, 1835, for *Kent*, it appeared, that the lessor of the plaintiff was tenant by elegit, under a judgment in an action of covenant, against *Sir Gregory Osborne Page Turner*, signed in *Hilary Term*, 1819. The covenant was entered into with *Joseph Howell*, in *March*, 1807. In *October*, 1819, *Howell* died, and on the 25th of *May*, 1820, administration was granted to *Mary Oswin*, one of the lessors of the plaintiff. In *May*, 1828, the judgment was revived at her suit. On the 30th of *May* judgment was executed, and an inquisition returned by the sheriff. *Mary Oswin* afterwards died, and administration *de bonis non* of the effects of *Joseph Howell*, the original judgment creditor, was granted to the wife of *Barron*, also one of the lessors of the plaintiff. The defendants claimed as mortgagees, under a mortgage executed in 1823. Evidence to prove that the judgment had been regularly docketed was gone into. A clerk to the attorney for the mortgagees proved a search at the judgment office for judgment against *Sir G. Turner*, and he produced a list of different entries, from which it appeared, that from 1811 to 1822 various proceedings had been docketed against him; but the only entry at the suit of *Howell* was as follows: "1818, *Michaelmas*. Covenant,—at the suit of *Joseph Howell*, 420." *Howell's* attorney proved, that the judgment had not been docketed by him previously to the latter end of 1828, when the papers were removed out of his hands. The attorney into whose hands they were put proved, that he completed the judgment in 1828, when the roll was carried in by him. On this evidence it was objected, that there was no proper docket of the judgment; and *Braithwaite v. Watts (a)* was relied on. The learned judge refused to nonsuit, but reserved the point; and a verdict was found for the plaintiff. A rule was accordingly obtained for entering a nonsuit.

Platt and *Wightman*, showed cause. The docket-book shows that the judgment was properly docketed.—[*Patteson, J.*—No, it shows that the issue only was docketed; and it has been expressly held, that docketing the issue is a distinct act from that of docketing the judgment.]—The entry is in strict accordance with the practice, which is, to enter the number of the roll, and docket the issue; and afterwards, when judgment is signed, to enter

the amount of damages. This, then, constitutes a perfect docketing of the judgment; and is shown to have been done in the present instance. In *Ramsbottom v. Buckhurst* (a), it was held, that an examined copy of the judgment roll containing the award of the elegit, and return of the inquisition, was sufficient evidence of the title of the plaintiff.

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Per Curiam.—Docketing the judgment is something more than docketing the issue. It is the duty of the plaintiff's attorney to see that this is done. The judgment was not completed in the present case so as to take precedence of the mortgage. The rule for a nonsuit must, therefore, be made absolute.

Rule absolute.

(a) Bull. N. P. 104.

SLEGG v. PHILLIPS.

ASSUMPSIT, on a joint and several promissory note for 200*l.*, drawn by the defendant and one *Crippen*. *Plea*: that the note was given upon an illegal consideration. At the trial before Lord *Denman*, C. J., at the sittings at *Westminster*, after *Michaelmas* Term, 1834, *Crippen* was called by the defendant as a witness, to show that the consideration of the note was illegal, under 7 *Geo.* 2, c. 8, the note having been given to secure a sum of money advanced to the defendant and *Crippen*, for the purpose of paying losses on time bargains in stock. He proved that he had paid two several sums of 50*l.* on account of the principal sum in the note, but admitted that there was at that time 10*l.* due for interest. He was objected to, as being an interested witness, on the ground that he had a greater interest to procure a verdict for the plaintiff than for the defendant; inasmuch as, in the former case, he would be liable only for contribution to a small amount, whilst in the latter he might be called upon, in an action against himself, to pay the whole amount remaining due on the note. *Simmons v. Smith* (b) was referred to.

In an action against one of two makers of a joint and several promissory note, the other maker of the note cannot be called as a witness for the defendant, to prove that the consideration given for the note was an illegal consideration. His interest in defeating the note altogether renders him incompetent.

Lord *DENMAN*, C. J., after argument, decided that *Crippen* was not a competent witness, and rejected him. A verdict was found for the plaintiff. A rule was obtained for a new trial, on the ground that the testimony of the witness was improperly excluded.

Sir *F. Pollock* and *R. V. Richards*, showed cause against the rule. All the cases show, that, in an action against one of two parties, where both are jointly liable, the other is not a competent witness for his co-contractor. This was clearly laid down in *Evans v. Yeatherd* (c), which was a stronger case than the present; for there the witness came apparently to charge himself, by showing that the goods, which were the subject of the action, had been furnished to himself and his partner the defendant; but he was also to discharge the demand by showing that they had been paid for, by remitting a debt due from the vendor to the firm. *Simmons v. Smith* is

(b) *Ryan & Moody*, 29, and 1 *Stark. Evid.* 107.

(c) 2 *Bing.* 133.

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the last of the cases on this subject, and goes further than any of the rest, for it decides, that no release will, under such circumstances, render a man a competent witness. But in *Hall v. Cecil* (a) the ground of objection to the witness's competency is most plainly expressed; namely, that though it is ultimately against his interest to render himself liable to contribution to his partner, he has a stronger and more immediate interest to defeat the action, or lessen the damages.—[*Patteson, J.*—The difference between the cases cited and the present appears to me to be this, that in all the others the evidence merely went in abatement of the existing action. Here the witness is called to prove not merely that there was a joint contract, but that the contract is of an illegal nature, and can never be the subject of an action.]—If it be clear that he cannot, on account of a partial interest operating at the moment, be admissible as a witness, it is still more clear, that his interest renders him incompetent when he comes affecting to make himself a party to a joint contract, but, in reality, to get rid of the contract altogether.

Erle, in support of the rule. The plaintiff ought to show, that on this trial, the witness had an interest to get a verdict for the defendant, for otherwise he is a competent witness. What is the liability which a joint maker of a promissory note comes to establish, on proving that he himself is so? Does he not fix upon himself an ultimate responsibility?—[*Patteson, J.*—He does not; if, at the same time, he vitiates the note itself, by showing it to be illegal and void.]—[*Coleridge, J.*—The argument you are now employing was used in *Hall v. Cecil*, but the Court thought, that the witness's interest in another respect, namely, as to costs, was more to be considered.]—But in *Knight v. Hughes* (b) it was held, by Lord Tenterden, that a co-obligor, suing for contribution, had no right to demand contribution as to costs. If the witness had established the plaintiff's right to sue him as a joint contractor, he would have incurred a liability greater than any advantage he could gain, or any liability he could get rid of by getting a verdict for the defendant. He came to speak against his own interest, and was, consequently, a competent witness.

Lord DENMAN, C. J.—It appeared to me at the trial, that the cases which have been decided in the *Common Pleas* called upon me to reject the testimony of the witness. It does not appear now to be denied that the witness had an interest in defeating the action. It does not appear that he would be liable directly to contribute any thing on a verdict given for the defendant. It is true that he comes to prove the giving of the note, but he also comes to prove it a nullity. The argument for the defendant, in favour of the witness's admissibility, is, that he would ultimately be benefited in a verdict passing for the plaintiff for the whole amount; because, as he was liable upon the whole, the verdict against the defendant would be a discharge of him from half of his share, and he would be only liable to pay to the defendant a moiety; the amount of the verdict against the defendant being so much to his credit. It appears to me that it does not lie in the defendant's mouth to use such an argument, because his very defence is, that the note was a nullity; and the witness called to prove that defence

(a) 6 Bing. 181.

(b) 3 Carr. & Payne, 467; and Moo. & Mal. 247.

might make use of it, in another proceeding, to save himself from all liability on the note.

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LITLEDALE, J.—I also think, that the witness in this case was not competent, on the ground of interest. If he could prove that the note was illegal, and that the defendant was not liable, he saved himself from all liability to contribution. On another ground, also, I think him incompetent. He came to prove the illegality of the note. In this respect he and the defendant had a common interest. In this instance he was the witness. If the action had been brought against him, the defendant would have been called as his witness to prove the illegality of the note. By those means these two people would get rid of their liability altogether.

PATTESON, J.—I think the testimony of this witness was rightly rejected. The plea which the witness was called to prove states the illegality of the consideration for the note; and the witness is not called, as in the other cases, to prove the joint liability, but to show that the note is altogether bad. It is quite clear, that if the plaintiff recovered against the defendant in this action, the defendant, being a co-maker of the note with the witness, might sue the witness for contribution. I grant if the witness had already paid all that the present defendant could recover against him by way of contribution, he would have ceased to be interested, but he has not paid all; he would, in an action for contribution, be liable for what remained of his share, and for the amount of interest due. It is said that he has an interest the other way, for that if the plaintiff does not recover in this action, he may sue the witness as a co-defendant. This, however, is but a contingent interest—while these parties are directly interested in defeating actions against each other. I will not, however, put it on that ground. Although this judgment could not be directly available in an action against the witness, one cannot help seeing, that there is a common interest in these two parties to assist each other. In *Hall v. Cecil* the Court thought, that one of two joint contractors had a direct interest to defeat the action and lessen the damages, and therefore rejected him. Here the witness has a direct interest in the subject-matter of the suit, so that the object of the action may not be accomplished.

COLERIDGE, J.—The facts here do not bear out the arguments of Mr. Erle. The doctrine, that the co-contributor has an interest to support, rather than defeat an action like the present, is certainly novel. I do not think it sound. True, he appears to come to fix the liability on himself; but also, as in this case, with a direct interest to defeat the right of action itself. The interest which he has on the other side is uncertain, because it depends on the chance, whether an action might or not be brought against him by the defendant for contribution. By stating that the instrument on which the action is brought is itself illegal, he in effect gets rid even of that uncertain liability; for he shows, that in respect of that instrument no action could be maintained against him by his co-contributor.

Rule discharged.

King's Bench.

SCOTT and others, Executors, v. BRIANT.

In actions by executors, all who are named in the will may join, though some only of them have proved; and it makes no difference that issue is raised on a plea of *no unguis executor*.

SCIRE FACIAS by the plaintiffs, as executors, to revive a judgment obtained by the testator. Profert was made of the probate. *Plea*: that the plaintiffs were not executors; and issue joined on that point. All the plaintiffs were appointed executors by the will, but probate had been granted to *Scott* alone, leave being reserved to the others to come in and prove. Verdict for the plaintiffs on the opinion of the learned judge. A rule was however obtained to arrest the judgment, or for a nonsuit, or new trial.

R. V. Richards showed cause.—In actions by executors, all who are named in the will must join, though some only may have proved; *Brookes v. Stroud* (a), *Walters v. Pfeil* (b). If some are not joined, the defendant may plead in abatement (c). This course was pursued in the present instance, and is perfectly regular.

Mansel, in support of the rule.

LORD DENMAN, C. J.—The verdict was perfectly right. In *Comyns' Dig. tit. Pleader* (2 D 1), it is expressly laid down, that in an action by executors all must join, though some do not prove the will, but refuse before the ordinary. That is the general rule, and the question is not at all altered, because in this instance an issue has been taken upon the fact of the plaintiffs being executors. The question raised is, whether they are so; and undoubtedly they are.

LITLEDAL, J.—By the act of granting probate, all who are named as executors in the will have been acknowledged to be such by the proper tribunal. The question raised on this issue is, whether those persons are executors. I cannot doubt that they are. In *Bro. Abr. Executors*, pl. 27, it is said, "Debt by one executor. The defendant says that there is another executor alive, whereupon he prays judgment of the writ. The plaintiff says, that he is discharged from the administration, and never administered. Nevertheless the writ was quashed, because he can administer when he pleases."

PATTESON, J. and COLERIDGE, J. concurred.

Rule discharged.

(a) 1 Salk. 3.

(b) Mood. & Malk. 362.

(c) 1 Wms. Saund. 391, i.

DUKE DE CADAVAL v. COLLINS.

A party knowingly arrested another for an unfounded claim.

The party arrested, in order to obtain his discharge, paid a part of the amount, and entered into an agreement to put in bail for the remainder:—*Held*, that he might recover back the amount paid, in an action of *assumpsit* for money had and received.

ASSUMPSIT, for money had and received. *Plea*: general issue. Trial before Lord Denman, C. J. at the London sittings after last term. The

action was brought to recover back 500*l.* paid to the defendant by the plaintiff, to obtain his release from an arrest on a totally unfounded claim. The defendant had acted as the agent for the *Portuguese* government of *Don Miguel*, and in that character had pecuniary claims upon that government. In 1833 he became embarrassed, and took the benefit of the Insolvent Debtors' Act. In 1834, the plaintiff, who had been a member of the government of *Don Miguel*, came to *England*, and the defendant claimed from him personally the amount of what he conceived to be due to him from the government. In *July*, 1834, the defendant made an affidavit of debt for 16,200*l.* against the plaintiff, and having issued a writ of *capias*, procured a warrant on it, and placed it in the hands of a sheriff's officer. The plaintiff was arrested, and thereupon entered into a negotiation with the defendant; and on the 5th *August*, 1834, the following memorandum was drawn up and signed by the plaintiff and the defendant:—"We the undersigned agree to the following conditions: first, his excellency the *Duke de Cadaval* pays 500*l.* in lawful money of *Great Britain* to *Thomas Collins*, as a payment in part of the writ issued in *London* for 16,200*l.*, and the remainder, his excellency to give bail immediately, to run the usual course of an action in the Court of *King's Bench*; both of us to abide the result; the said 500*l.* to be paid at nine o'clock to-morrow morning, for which *Mr. Lake*, the consul, is responsible." In accordance with this memorandum the plaintiff was set at liberty, and on the following day a more formal agreement was drawn up, and the receipt by *Collins* of 500*l.* acknowledged. The present action was brought to recover back that sum of 500*l.* It was objected at the trial, on the authority of *Marriott v. Hampton* (a), and *Linden v. Hooper* (b), that money paid under legal process could not be recovered back by the party paying it in this form of action. His lordship, however, reserving that point, left the case to the jury to say whether the proceedings were colourable, or whether they were *bonâ fide*, and with a belief that the plaintiff owed money to the defendant; and directed them, if they thought the proceedings colourable, to find for the plaintiff. The jury found a verdict for the plaintiff for 500*l.* A rule for a nonsuit was obtained.

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The *Attorney-General*, *Kelly*, and *Alexander*, were to have shown cause, but were stopped by the Court.

Platt and *Butt* in support of the rule.—This money was paid by the plaintiff to the defendant after process had been issued, and under an agreement made with a full knowledge of all the facts of the case; and therefore it cannot be recovered back in this form of action; *Marriott v. Hampton* (a). The same thing was held in *Knibbs v. Hall* (c) and *Brown v. M'Kinally* (d).—[*Coleridge*, J.—In both those cases the payment was voluntary.—*Patteson*, J.—In a later case, *Fulham v. Down* (e), Lord *Kenyon* appears to qualify what he had before said in *Knibbs v. Hall*. He seems to say, that a voluntary payment of an illegal demand to redeem the person or the goods, may be the subject of an action for money had and received.]—The case of *Snowdon v.*

(a) 7 Term Rep. 269.

(b) Cowper, 214.

(c) 1 Esp. 84.

(d) 1 Esp. 279.

(e) 6 Esp. 26.

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*Davis* (a), in which it was held, that money paid under compulsion may be recovered, is distinguishable, because there the money was paid in fear of an arrest, which the party was not authorized to make at all. In *Hamlet v. Richardson* (b), where a payment was made in consequence of a writ having been issued against the plaintiff, it was held, that the money could not be recovered back, as there was no fraud on the part of the defendant. This is not the proper form of action. If any could be maintained, it would be an action for a malicious arrest.

LORD DENMAN, C. J.—I was desirous that this case should be considered, in consequence of *Marriott v. Hampton*. The general principle stated in the margin is, that “where money has been paid by the plaintiff to the defendant under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.” Upon looking at the case, however, it appears that the marginal note is not warranted. The case merely decides, that where money had been paid by the plaintiff to the defendant, *after trial and recovery*, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. Lord *Kenyon* puts this as the ground of decision: “If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person.” *Grose*, J. says, “It would tend to encourage the greatest negligence, if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence.” That case, therefore, did not arise on a question of extortion under colour of legal process; but merely determined, that if a cause has been once regularly decided, it ought not to be disturbed. Another reason, which made me desirous that the question should be considered, was the inconvenience of two actions for the same grievance being open to the plaintiff. This money might also have been recovered as damages in an action for a malicious arrest. Now even there is no bar to such an action being brought. I therefore felt this inconvenience; but I do not see how that circumstance can defeat the right of the plaintiff to maintain the present action.

LITLEDALE, J.—The case of *Marriott v. Hampton* is perfectly distinguishable from the present, and furnishes no authority for our saying, that in this instance an action for money had and received cannot be maintained. I agree that there is a difficulty, on the ground that an action for a malicious arrest will also lie. I do not, however, think that circumstance sufficient to prevent the plaintiff from recovering in this action. It by no means follows, that because the plaintiff can recover in another form of action, that he cannot recover in this.

PATTESON, J.—I think the verdict is perfectly right. I put my judgment, however, entirely upon the special circumstances of the case; because I agree, as a general proposition, that if a party pays money under compulsion

(a) 1 Taunt. 359.

(b) 9 Bing. 644.

of law, he cannot recover it back again. I even go the length of saying, that if a party, thinking that a debt is due to him from another, arrests that other, and receives the money which in truth is not due to him, that cannot be recovered back again. But then every case must be taken to be *bonâ fide*. Here it is quite clear, both on the facts and on the finding of the jury, that there was no *bona fides* on the part of the defendant. If so, the process was used colourably for the purpose of obtaining the money; and it would be a great scandal to our law, if the defendant could be allowed to succeed in retaining it.

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COLERIDGE, J.—I am of the same opinion. It is not necessary, in order to support this action, that any of the previous decisions should be disturbed. The general principle is sufficiently clear; but there is no case which has determined, that he who having no demand, fraudulently and colourably uses legal process to force a payment of his claim, shall not be liable in an action for the recovery of that money back again. In *Selwyn's Nisi Prius* (a) it is said, that "If an undue advantage be taken of a person's situation, and money be obtained from him by compulsion, such money may be recovered in an action for money had and received;" and, in support of that proposition, *Astley v. Reynold* (b) is cited.

Rule discharged.

(a) Page 86.

(b) 2 Stra. 915.

## MORRIS v. DIXON.

**A**SSUMPSIT, for money lent. *Pleas: non assumpsit*, and the Statute of Limitations. At the trial before *Vaughan, J.* at the *Chester Summer Assizes 1834*, the only evidence given to take the case out of the statute was the following memorandum. It was dated the 30th June, 1832, and signed by the defendant, but was without any stamp. It was in the following terms:—"I acknowledge to owe to Mr. *James Morris* the sum of 36*l.*, which I agree to pay to him as soon as my circumstances will permit me to do so." It was objected that this memorandum should have been stamped as an agreement; but the learned judge, thinking that it did not require any stamp, admitted it in evidence, and a verdict was found for the plaintiff, with leave to move to enter a nonsuit. A rule having been accordingly obtained,

An acknowledgment in this form, "I acknowledge to owe to Mr. *James Morris* the sum of 36*l.*, which I agree to pay to him as soon as my circumstances will permit me to do so," was held to be admissible in evidence without any stamp, to take a case out of the Statute of Limitations.

*Cottingham* and *Cowling* showed cause.—This document is nothing more than a mere acknowledgment within the 9 *Geo. 4*, c. 14, s. 8, and is exempt from stamp duty. That is clearly the case as regards the first part of the document. If that had stood alone, the case would have been within the decisions upon I O U promises. The subsequent portion of the document can make no difference, for it is not material, and contains nothing more than what the law would imply. *Mullett v. Huchison* (a), and *Langdon v. Wilson* (b), are authorities to show that a document of this description does not require any stamp to make it admissible as evidence of an acknowledg-

(a) 7 Barn. &amp; Cress. 639.

(b) 7 Barn. &amp; Cress. 640.

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ment. It cannot be an agreement, because there is a want of mutuality ;  
*Lees v. Whitcomb (a).*

*J. Jervis*, in support of the rule, cited *Williamson v. Bennett (b)*.

LORD DENMAN, C. J.—When this rule was granted, I thought there was no other evidence in the cause of money having been lent by the plaintiff to the defendant. If that had been so, this document, which on the face of it purports to be an agreement, would have been the only evidence of any debt ; and being an agreement, would have required a stamp. That, however, turns out not to be the case. There was other evidence of the original debt, and this document was merely used to take the case out of the Statute of Limitations. Being, therefore, a writing of that description, it is within the exemption in the statute, and requires no stamp.

LITLEDALE, J.—The statute must apply to something. I do not see to what description of documents it could apply, if it does not apply to this.

PATTESON, J.—I thought at first that there was nothing to show that this instrument did not require a stamp ; but on consideration, I think now that it is an acknowledgment within the meaning of the statute, and, as such, exempt from stamp duty.

COLERIDGE, J.—I think that whatever a party uses for the purpose of taking a case out of the operation of the Statute of Limitations, is within the exemption of the statute 9 Geo. 4. If there had been no other evidence of the debt, I should have thought that the instrument was made for the purpose of proving the debt, and not of taking the case out of the operation of the Statute of Limitations.

Rule discharged.

(a) 5 Bing. 34.

(b) 2 Camp. 416.

### ALCOCK and others v. TAYLOR.

1. The 3 & 4 Will. 4, c. 52, s. 108, requires, that previously to the unloading of goods carried coastwise, a written notice of the ship's arrival, signed by the master, shall be given to the collector or controller of customs, by the master, owner, wharfinger, or agent of the ship, and that certain documents should be obtained. In an action of *assumpsit* for demurrage,—*Held*, that non-compliance by the plaintiff with the above provisions, could not be given in evidence under the general issue.

2. A statutory objection of this description should be specially pleaded.

**A**SSUMPSIT, for demurrage. *Plea: non assumpsit.* At the trial before Lord Denman, C. J. at the last assizes for Northumberland, the defendant set up as a defence, that the plaintiffs had not procured the documents required by 3 & 4 Will. 4, c. 52, s. 108 (a). The learned judge thought

(a) By which it is enacted, " that no goods shall be laden on board any ship in any port or place in the united kingdom or in Man, to be carried coastwise, or having been brought coastwise, shall be unladen in any such port or place from any ship, until due notice in writing, signed by the master, shall have been given to the collector or controller by the master, owner, wharfinger, or agent of such ship, of the intention to lade goods on board the same to be so carried, or of the

arrival of such ship with goods so brought, as the case may be, nor until proper documents shall have been granted, as thereafter directed, for the lading or for the unlading of such goods : and such goods shall not be laden or unladen except at such times and places, and in such manner, and by such persons, and under the care of such officers as is and are thereafter directed : and all goods laden to be so carried, or brought to be so unladen contrary thereto, shall be forfeited."

that such a defence could not be gone into under a plea of the general issue, but he reserved the point, and a verdict was found for the plaintiffs.

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*Alexander* now moved to enter a nonsuit.

LORD DENMAN, C. J.—The statutory objection was not specially pleaded. It could not be made available under the general issue; the rule must therefore be refused.

LITTLEDALE, J., PATTESON, J., and COLERIDGE, J. concurred.

Rule refused.

### ATKINS and another v. OWEN.

**ASSUMPSIT**, for money had and received. *Plea*: general issue. At the trial before *Littledale, J.* at the Spring Assizes for *Devonshire* in 1836, it appeared that the plaintiffs were the trustees under the marriage settlement of one *Studdy*; and that *Studdy* and his wife were lodging at the house of the defendant. *Studdy* was entitled to receive some rents of property to which he was entitled in *Newfoundland*; and such rents were usually remitted to his agent *Vallance*, in bills payable to the order of *Studdy*. *Studdy* having borrowed 150*l.* from the plaintiffs, directed *Vallance* by letter to pay them that sum out of his *Newfoundland* rents. *Vallance* having received two bills on account of the rents, the one for 100*l.* and the other for 47*l.* 16*s.*, accordingly sent them to the plaintiffs. The bill for 100*l.* was handed over to Mrs. *Studdy*, in order to get her husband's indorsement to it. Mrs. *Studdy* employed the defendant to procure this to be done. It was done; and he then claimed to retain the bill on account of a debt alleged to be due to himself from *Studdy*. The defendant paid the bill into his bankers on his own account, and received credit for the amount. He drew on his account generally, but he never drew specifically upon the credit of the bill. It became due after the action was commenced, and was paid in due course. The learned judge, thinking that under these circumstances an action for money had and received was not maintainable, nonsuited the plaintiffs, with liberty to move to enter a verdict.

A person to whom a bill was entrusted wrongfully, paid it into his bankers on his own account, and received credit for the amount, but never drew specifically upon the credit of the bill. An action for money had and received was brought by the owner of the bill before it became due:—*Held*, that it was not maintainable.

*Crowder* now moved accordingly.—No doubt trover would have been the more proper form of action; but that is no reason why the plaintiffs may not waive the tort, and sue in *assumpsit*. It is not essential that money should pass between the parties in order to maintain this form of action; *Reed v. James (a)*. The bill was turned into money by being placed to the credit of the defendant. In insurance transactions, if a broker debit an underwriter in account with the amount of a loss, he is liable to his principal for money had and received, though no money may have actually ever come to his hands; *Wilkinson v. Clay (b)*, *Andrew v. Robinson (c)*. That is on the

(a) 1 Stark. 132.

(b) 6 Taunt. 110.

(c) 3 Camp. 199.

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ground of the estoppel by reason of the account.—[*Patteson, J.*—In the case of an insurance broker, he in the regular course of his business admits the receipt of money; it is no defence in an action against him by his principal, for him to say that no money ever actually came to his hands. If he were to fail, there could be no recovery against the underwriters. The cases cited are therefore distinguishable from this on that ground. Here, if the bankers had failed, still there might be a recovery from the defendant. The cases cited go upon this principle, that it did not lie in the mouth of the defendant to say that no money had ever come to his hands.]—So here that principle is applicable; the bill was wrongfully converted by the defendant, and his having credit for it given to him by his bankers, he either had, or might have had the proceeds in his hands, and cannot now say that he had not.

Lord DENMAN, C. J.—The conduct of this defendant has been such, that if possible we would make him liable in this action. It is, however, quite clear to me that this form of action is not maintainable. We must view the case as if the bill were not yet due; and in that case, if not paid, the defendant might be called upon to pay the amount twice over.

LITLEDALE, J. concurred.

PATTESON, J.—This is in substance a loan by the bankers to the defendant on the credit of the bill. In the meantime the amount cannot be money had and received to the use of the plaintiffs, whilst it is a question whether the bill will be ultimately paid.

COLERIDGE, J. concurred.

Rule refused.

JEFFERY v. BASTARD, Esq.

1. A replevin clerk is bound to make reasonable and cautious inquiry into the apparent responsibility of persons who, being unknown to him, tender themselves to him as replevin sureties.

2. It is not sufficient to take the statements of the parties themselves: the replevin clerk must inquire from other persons.

3. *Somble*, that he is not bound to travel out of his own office for the purpose of making inquiries, but he may require vouchers to be brought to him.

CASE, against the sheriff of *Devonshire*, for taking insufficient pledges to a replevin bond. *Plea*: that before the taking by the defendant of those persons as sureties, the defendant instituted, and made a due and proper and reasonable inquiry into the circumstances, estate, substance, and condition of each of them, with a view, and in order to ascertain whether each of them was a good, able, and sufficient and responsible surety; and that upon such inquiry, and at the time of their becoming sureties, each of them appeared to the defendant to be, and ostensibly was a good, able, sufficient, and responsible surety. *Replication*, and issue on the facts of the plea. At the trial before *Littledale, J.* at the last Assizes for *Devonshire*, the plaintiff gave evidence to show that both the sureties were in notoriously bad circumstances. For the defendant the replevin clerk was called. He proved that both the sureties were brought to his office in *Exeter*, by a clerk of the attorney for the plaintiff in replevin. One of them resided at *Ottery St. Mary's*, which

is twelve miles from *Exeter*; and the other at *Rockbeare*, which is nine miles from *Exeter*. The replevin clerk was not at all acquainted with either of the sureties, but knew the clerk who came with them. He made no inquiries from the clerk as to the means and situation in life of the parties; but he minutely examined them, both together and separately, as to their circumstances in life, and the nature and situation of their property. The replevin clerk also embodied their answers in an affidavit, to which they were sworn, previously to their being accepted. The statements made by the sureties were sufficient. The learned judge left the question of proper inquiry to the jury, stating it, however, as his opinion, that the inquiries being made only of the parties themselves, were not sufficient; and that as the replevin clerk knew nothing of the parties themselves, he ought to have required the evidence of other persons. The jury found a verdict for the plaintiff with 160*l.* damages.

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Crowder moved for a new trial, on the ground of misdirection.—Enough was done by the replevin clerk. If he ascertained that the sureties were apparently responsible, it was enough; *Hindle v. Blades* (a).—[Lord Denman, C. J.—In that case the replevin clerk was not bound to make particular inquiries, because there was a *prima facie* case of respectability. Here the replevin clerk did undertake to make inquiries, and the question is, whether he made inquiries from the proper parties.—*Coleridge, J.*—His duty is to ascertain the apparent respectability of the sureties. How can that be said to be properly performed by any examination of the parties themselves?—It is submitted, that such an inquiry might be sufficient if *bond fide*. It must be a question in every case for the jury, whether reasonable inquiry has been made or not; *Scott v. Waithman* (b) and *Sutton v. Waite* (c). In the present instance, the jury could not exercise a just discrimination, in consequence of the direction they received from the learned judge.

LORD DENMAN, C. J.—The question is, whether we are to set aside the verdict in this case and grant a new trial. It is admitted that the sureties were in point of fact not sufficient; but the issue was raised upon the question whether reasonable and proper inquiries had been made as to their circumstances. The question of the reasonableness of the inquiries is a matter for the consideration of the jury. If my brother *Littledale* had said that it was a question of law, and had taken the case out of the hands of the jury, it is clear that there must have been a new trial. But it appears to me that he did no such thing. All he meant to do was to make a general observation on the point. There was therefore no misdirection. It seems to me that the circumstance of the parties living at a distance, would not dispense with the obligation to make proper inquiry. Here the jury could not hesitate to say that the inquiry made was utterly insufficient. I cannot help thinking also, that the taking the affidavits in so irregular a manner, shows that there was considerable doubt of the sufficiency on the mind of the replevin clerk.

LITLEDALE, J.—What I said as to the duty of the replevin clerk in

(a) 5 Taunt. 225.

(b) 3 Stark. 168.

(c) 8 Moore, 27.

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making inquiries may have been expressed strongly, but I did not intend, by any thing I said, to lay down any general rule of law. My expressions must be taken as applicable to the present case, and to that alone.

PATTESON, J.—The rule is clear, that reasonable caution must be used in making the necessary inquiries. If it could be said that the effect of our decision would be to compel the replevin clerk to go about making inquiries, I should hesitate before I concurred in it; but I cannot see how that can be so. If the replevin clerk knows the parties, he will act on his own knowledge. If he does not, he has a right to say, "Satisfy me that you are sufficient, or I will not accept you." In this case nothing like an inquiry was made from any person but the parties themselves; and that is, in my opinion, not sufficient. It does not follow that the sheriff or the replevin clerk is bound to travel out of his office, at his own expense, to make inquiries; but he may require the parties to place before him such vouchers as will be satisfactory to his mind. If this had been done in the present instance, there would have been a strong case to go to the jury of a reasonable inquiry having been made.

COLERIDGE, J.—We are all agreed as to what the rule is by which the duty of the replevin clerk is regulated, where the parties who present themselves to him as sureties are unknown to him. He is to make reasonable and cautious inquiry into their apparent responsibility. The question is, whether he has done so in the present instance. I think, under the circumstances, that he has not.

Rule refused.

The KING v. The Principal and Ancients of the Society of BARNARD'S INN.

The Inns of Chancery are so far voluntary societies, that this Court possesses no power to compel them by *mandamus* to admit an attorney to be one of their members.

IN this case a rule had been obtained, calling on the principal and ancients of *Barnard's Inn*, to show cause why they refused to admit Mr. *Gresham*, an attorney, to be a member of their body. The affidavits on which the rule was applied for stated, that *Barnard's Inn* was one of the Inns of Chancery, originally instituted, subject to *Gray's Inn*, one of the Inns of Court, for the purpose of providing in earlier times for the better studying of the law: that it was the smallest and richest of the Inns of Chancery; and that its management and property were now engrossed by particular individuals: that *Barnard's Inn*, belonging to *Gray's Inn*, was subject to the visitation of the benchers of that learned Society. The Judges had been declared, by two rules of the Privy Council, in 1574 and 1704, to have jurisdiction over the Inns of Chancery, as well as over the Inns of Court. In *Dugdale's Origines Judiciales* (a), under the head of "Orders necessary for the Government of the Inns of Court, &c. 1574," was this entry:—"The reformation and order for the Inns of Chancery is referred to the consideration of the Benchers of the houses of Court, to which they are belonging;" and

(a) C. 70, p. 312.

again (a), "That the Inns of *Chancery* shall hold their government subordinate to the Benchers of every of the Inns of Court to which they belong, and that the Benchers of every Inn of Court make laws for governing them." The principal and ancients of *Barnard's Inn* had three times refused to admit Mr. *Gresham*, but without giving any reason for their refusal; and the Benchers of *Gray's Inn*, after an examination of the case, had decided that they possessed no power of interference. The present application was, therefore, made to the superintending jurisdiction of this Court. Mr. *Gresham* produced testimonials signed by one serjeant and nine barristers, two of whom were King's Counsel, in support of his application to be admitted, and he stated, that he believed he had no other remedy but by appeal to the high jurisdiction of this Court.

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Sir *William Follett* showed cause against the rule. The only precedents for this application are to be found in *Rex v. The Benchers of Gray's Inn* (b), and *Rex v. The Benchers of Lincoln's Inn* (c); and both these are precedents against this application. In both the Court held, that these were voluntary societies, and that an application like the present could not be granted. This Court has no authority to order the members of this Society to receive the applicant as one of their members; and if the old order, (now never complied with,) that every attorney shall be a member of an Inn of Court, or of an Inn of *Chancery*, is to give him the right now contended for, he will have just as much right to apply against any other Inn as against this. The property of these Inns consists chiefly of leases. Every person admitted a member of them has some control over their property. By what right is it pretended that this applicant may claim the exercise of the power of this Court, to give him this control over the property of a Society which does not desire to enrol him among its members? By the rules of this Society a man can only be admitted a member after being proposed and seconded for election. The members have a right to make these rules. On what ground is a person to be admitted a member without observance of them.—[*Coleridge, J.*—Is there no power of control over the proceedings of these bodies?]
 None. The Benchers of the Inns of Court have never exercised any. In *Rex v. Allen* (d) this Court declared, that the Benchers of the *Inner Temple* do not appear to have any compulsory power over *Clifford's Inn*, and discharged a rule similar to the present, which had been obtained against the principal of that Inn.—[*Coleridge, J.*—In Mr. *Amos's* edition of *Fortescue* it appears, that in *Fortescue's* time the Inns of *Chancery* were the resort of the young men of the profession.]—[*Littledale, J.*—The order of 1704 declares, that all attorneys and clerks of the Court shall be members of the Inns of Court, if those Honorable Societies will admit them, which shows a discretionary power in the Inns of Court, but there does not appear any such discretion in the Inns of *Chancery*.]—But since those rules were made the practice of attorneys has been regulated by statutes, which have therefore effected a virtual abrogation of all those rules. The clerical profession presents an analogy to this case. The bishops have declared, that no man shall be inducted who has not taken a degree at the University. Can any

(a) C. 72, p. 322.
 (b) Dougl. 353.

(c) 4 Barn. & Cress. 855.
 (d) 5 Barn. & Adol. 984.

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man apply to this Court for a *mandamus* to any of the colleges to admit him. There is no inchoate right in any man to compel an admission of himself to be a member of this Society; and consequently there can be no authority for this Court to interfere for such a purpose.

*Kelly* and *Kennedy*, in support of the rule. There is a strong *prima facie* case in favour of this application.—[*Coleridge*, J.—You must make out that this applicant has an inchoate right to what he asks, so as to call for the interference of the Court to secure him the full enjoyment of it.]—There exists some doubt as to the origin of these minor societies. *Fortescue* says (a), “The method of the study of the law I will describe. In these Inns of *Chancery* the students are young men who study the judicial writings and the principles of the law, and afterwards they are admitted to the Inns of Court.” Then *Blackstone* says (b), “In this judicial university, (for such it is insisted to have been by *Fortescue* and Sir *Edward Coke*,) there are two sorts of collegiate houses, one called Inns of *Chancery*, in which the younger students of the law were usually placed.” Now, this university was regulated by orders of the Privy Council, which shows that it was a public body. Yet the answer to the present application is, that these are voluntary Societies, which are bound by no rules, and subject to no jurisdiction. In order to come to that conclusion it must be held, that the orders of the Privy Council, and the interference of the Lord Chancellor as a visitor, were illegal acts. The Court will not make any presumption of that kind; but, where the public authorities have passed orders for the regulation of these bodies, will treat them as subject to the jurisdiction of this Court.

LORD DENMAN, C. J.—I do not see that there is any authority giving us the power of interfering, in this manner, with the members of these Societies.

LITLEDALE, J.—The rules formerly made are inconsistent with the modern practice, and are never observed now, nor the non-observance of them punished.

*Cur. adv. vult.*

LORD DENMAN, C. J., subsequently said, we think that nothing, either on the affidavits, or that we have heard in the argument, shows that we have any authority to interfere in the manner now prayed, for the purpose of compelling this Society to receive Mr. *Gresham* as a member. The rule must, therefore, be discharged.

Rule discharged.

(a) C. 49.

(b) 1 Bl. Com. 25.

#### ANONYMOUS.

If the Court, on the authority of the report of its officers, pronounces, for the first time, a proceeding to be irregular, the party committing the irregularity must pay the costs occasioned by it.

IN this case a writ of error had been brought, and errors duly assigned by the plaintiff in error. There had been a joinder in error, but the joinder

in error had not been signed by counsel. For this supposed defect judgment had been signed by the plaintiff in error. A rule had been obtained to set aside this judgment, on the ground of irregularity; and it was stated, that, on application at the offices, all the officers agreed that the joinder in error did not require counsel's signature. The question was, who should pay the costs occasioned by the irregularity?

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*R. V. Richards*, for the defendant in error, contended, that this was like any other irregular proceeding, the costs occasioned by which must be paid by the party committing it.

*Archbold, contra*, insisted that till now it had always been at least doubtful, whether a joinder in error did not require counsel's signature; and that, consequently, the plaintiff ought not to be made to pay costs in this instance.

The COURT said, that there was nothing in this case to exempt the party in irregularity from payment of costs.

Judgment set aside with costs.

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*STEER* applied, that a person might be admitted an attorney as of the present term. The person on whose behalf he applied had fully complied with every rule except one (a), and on that one the officer of the Court raised a doubt. This rule related to the notice required to be given by him of his intention to apply for admission. The notice was to be given "three days at the least" before the term. In the present instance, the notice was given on the 12th for the 15th *April*. The officer of the Court thought, that three days at the least, meant three clear days. The words of the rule do not leave the matter without doubt. The rule, therefore, must be construed by reference to another rule relating to the computation of time (b), by which it is declared, "that in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Court, the same shall be reckoned exclusively of the first day, and inclusively of the last."

The rule which requires notice to be given by an attorney, of his intention to apply for admission, "three days, at the least," before the term, must be construed as if it required "three clear days," and the days must all be exclusive.

Lord DENMAN, C. J.—Does not the expression "at the least" supply the omission of the word "clear?" Under the special circumstances of this case we will not exclude the applicant; but, for the purpose of settling the rule, we will speak to the other Judges on the point.

*W. H. Watson* applied on behalf of another person, under precisely the same circumstances.

*Cur. adv. vult.*

(a) *Reg. Gen. Hilary Term*, 6 Will. 4, s. 5.  
"And it is further ordered, that three days, at the least, before the commencement of the

Term, &c." See 1 Har. & Woll. 639.

(b) *Reg. Gen. Hilary Term*, 2 Will. 4, s. viii.

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Lord DENMAN, C. J., on a subsequent day (18th *April*) said,—We think that both these persons may be admitted now, under the particular circumstances of the case ; but we have spoken to the other Judges on the subject, and we all agree that, upon the words of this rule, all the days must be considered exclusive, in the same manner as if the rule had said three “clear days” notice.

Rule granted.

### Ex parte RIDLEY.

Where a person, during his clerkship, changed his name, and by mistake forgot to put both his former and present name in his notice, the Court, on being satisfied that it was solely from mistake that he had omitted to do so, permitted him to give notice at the end of one term for admission in the next.

**W. H. WATSON** applied, that *Mr. Ridley* might be admitted as an attorney of this Court. The affidavit stated, that *Mr. Ridley* had been articled to an attorney carrying on business at *Newcastle*, and had served four years in his office, and one year, with his consent, in the office of a conveyancer at *Newcastle*. In the year 1835 he changed his name, in consequence of coming into the possession of some property. All the notices had been given in his present name, and not in the name he bore during the period of his service. By the rule of *Trinity Term*, 31 *Geo. 3*, every person desiring to be admitted an attorney is required (a), among other things, to “cause his name and place of abode to be affixed on the outside of the Court of *King's Bench*; and to enter in a book, to be kept for that purpose at each of the Judges Chambers of this Court, his name and place of abode, and also the name and place of abode of the attorney to whom he shall have been articled.” The rules of last *Hilary Term* require a similar notice (b). —[*Patteson, J.*—Did he refer, in the notices, to his change of name?—He did not ; he did not think of it till it was too late.—[*Patteson, J.*—Did he change his name while under articles?—He did, just about the time of his quitting the conveyancer's office, and of the expiration of his articles. The affidavit is very distinct, as to the omission to notice the change of name having occurred solely from forgetfulness ; as to his not having omitted it from any other cause whatever ; and as to the deponent's belief, that there was no opposition intended to be made to his admission.

Lord DENMAN, C. J.—We will consider this case also, and mention it when we decide the cases upon the notice.

*Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day (18th *April*) said,—Under the circumstances of this case, we think that the applicant should be permitted to put up his notices (stating both his names) until the end of this term, for admission in the next term. He may then be admitted on these fresh notices.

Rule granted.

(a) Tidd's Practice, 8th edition, 69.

(b) *Ante*, vol. i. 647, *et seq.*

## The KING v. The LORDS COMMISSIONERS of the TREASURY.

King's Bench.

**R**ULE for a *mandamus* to be issued to the Lords of the Treasury, requiring them to issue a Treasury minute, directing the Lords of the Admiralty to pay to *Robert Hand* the arrears of a pension granted to him for services in the Navy Pay Office. The applicant, besides having been a clerk in the Navy Pay Office, had been a sealer of writs in the Exchequer. An act was passed in the year 1832, for removing the business of the Navy Pay Office to the Admiralty. The consequence was, that many of the clerks were no longer necessary, and Mr. *Hand* was amongst others declared by the Lords of the Treasury to be entitled to a pension in respect of his abolished office. The statute of 3 Geo. 4, c. 113, settled the granting of pensions according to the length of service. The length of the applicant's service had been 25 years. His pension was therefore granted according to the scale settled by the act. While he continued in the office he was also in the receipt of the profits of the office of sealer of the writs. When the office in the Exchequer was abolished, the act directed that compensation should be given to the officers whose profits had thus been taken away. Under that last act the compensation to the plaintiff was calculated at 449*l*. Payment of the pension had since been refused, on the ground that his former office of clerk in the Navy Pay Office, having been abolished, Mr. *Hand* was receiving in respect of another office a larger sum than the amount of the pension for the office which had been abolished.

1. The Lords of the Treasury granted under 3 Geo. 4, c. 113, a pension for life to a person whose office had been abolished. They afterwards, thinking they had no power to grant such a pension, revoked their warrant. The amount once appeared in the parliamentary estimates, because the item could not be withdrawn in time. It was afterwards withdrawn, and no money was ever received from parliament on account of the pension, the sum which had been once in the estimates, having been applied to the ways and means:—*Held*, that a *mandamus* could not go to the Lords of the Treasury to enforce payment of the pension.

2. The Lords of the Treasury had no power to grant such a pension.

The *Attorney-General* and *Wightman* showed cause.—The pension was granted in the first instance under mistake, and when this mistake was discovered, the Lords of the Treasury rescinded the order for it. The applicant held an office to which he was appointed during pleasure, and the Lords of the Treasury, in directing that he should receive a pension, thought that they were but making him some fair compensation for the loss of his office. When, however, it was considered that he was holding another office exceeding in value the pension they had granted, they found they had exceeded their authority; and rescinded, as they had a right to do, their order. The name of the applicant had not recently been before parliament, so that there was no appropriation to him in the estimates. This distinguishes the case from that of *Rex v. The Lords of the Treasury*, determined in last *Michaemas Term* (a). In that case the allowance had been voted by parliament, and was admitted to be in the hands of the Lords of the Treasury. Besides, in that case the attention of the Court was not called to a most important decision in the Common Pleas; *Gidley v. Lord Palmerston* (b), in which it was held, that there is no remedy at law against a public officer by individuals for money, which as a public officer he is authorized to pay them, although he may have received the money applicable to that purpose.

Sir *W. Follett* and *J. Jervis*, in support of the rule. The crown might grant a pension for life, and having granted it, the Lords of the Treasury had no right to take it away. The name of the applicant was in the estimates submitted to the House of Commons; and the sum of money placed against it having once been granted, it must be taken that parliament had

(a) 1 Har. &amp; Woll. 533.

(b) 3 Brod. &amp; Bing. 275.

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sanctioned the grant. If so, the Lords of the Treasury became mere receivers of the money on his account; and on the authority of *Rex v. Lords of the Treasury*, the money must be treated as money had and received by them to the use of the applicant, to whom payment of it might be enforced under this rule. The case of *Gidley v. Lord Palmerston* does not touch the question at all, because that case turned entirely on the point whether there could be any implied contract between a public officer and an individual, in respect of matters arising out of a public transaction.

Lord DENMAN, C. J.—This rule cannot be supported. We have been referred in this case to the rule supposed to be laid down in a case decided by us in last *Michaelmas* Term, the case of *Rex v. Lords of the Treasury*, on the application of Mr. *Carmichael Smith*. It is a mistake to suppose that that case is an authority for the present application. The circumstances of the two cases are very different. There the Lords of the Treasury had admitted from time to time, that they had the money of the applicant in their hands; and they sought to impose on him a condition before paying it over. All that we then decided, was, that the Lords of the Treasury should make a return to the *mandamus* then applied for. In the case formerly before us we merely decided that the Lords of the Treasury should explain how it was that they considered themselves not bound to pay over to the applicant money of his, which they admitted to have in their hands. The facts here are very different. We are now called upon to inquire whether the Lords of the Treasury had the power to make this grant. If they had that power, then the question arises as to the effect of the proceedings which have since occurred between them and Mr. *Hand*. It appears that that gentleman held an office under the Navy Board. That office might in fact be held by him for life; but it was not necessarily by its nature an office of that sort. Then comes a question, as to his right to compensation on the abolition of that office. After the act of abolition had taken place, the Lords of the Treasury, wishing to put him in as good a situation as possible, stated, that they would grant him a warrant for a pension. It seems to me, on the best consideration I can give to the Act of Parliament, that they had not that power: that they had not authority to grant life pensions by warrant in this manner. In *August*, 1832, he was told, that he would receive a pension in lieu of the emoluments of his late office. If the Lords of the Treasury had the power to grant such a pension, they would have included the amount of it in the estimates laid before the House of Commons in the early part of the following year. Before that time arrived, the warrant for the pension was revoked, the appellant being thought to be fully provided for by his other situation. We have not any right to inquire whether this was a good reason or not for revoking his pension. In fact he was told, that the warrant for it would be withdrawn. There was afterwards a vote of the House of Commons for the sum of 240*l.*, on the estimate as for the reduction of the office. It is now satisfactorily explained, that that item was introduced by mistake, that that sum was not entered in the accounts; and that in the year following that sum was omitted from the amount of the money to be voted. After the period of the first vote, all the unappropriated money had been disposed of by parliament as part of the ways and means. The first vote merely gave the Crown the power of paying the money, but the Crown did not think fit to do so. The question might have arisen whether that was from mistake or not,

had the grant in the first instance been valid ; but it seems to me that the applicant here never was entitled to the money, and consequently, that the foundation of his claim being withdrawn, he cannot support this rule for the enforcement of it.

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 the Treasury.

LITLEDALE, J.—I think that the Lords of the Treasury had not the power to make this grant. In the first place, they had no funds from which they could pay this pension. In the character of Lords of the Treasury they had no right, but merely to give a recommendation. They could not grant the pension, for they had no authority to grant it ; and at all events they could not grant a pension for life, but only for such time as parliament should think proper to permit it to continue. As parliament voted this sum in the estimates of the first year, there was this sum of money in the hands of the Lords of the Treasury ; but they, finding that they had not authority to grant the pension, returned the money for the use of parliament, and by parliament it has since been applied to other purposes. On the whole I think that no case has been made out for our interference, and that this rule must therefore be discharged.

PATTESON, J.—I think that the rule for a *mandamus* in this case must be discharged. This application is founded on the 3 *Geo.* 4, c. 113, from which it appears that these pensions should be granted on the recommendation of the Lords of the Treasury ; but there is nothing in the statute which takes away from them the power to discontinue these pensions, if they so think fit. The office held by this applicant was an office held at pleasure, though perhaps it could scarcely be properly considered as an office at all. There was no provision in the statute that the applicant should have a pension for life, and therefore, the Lords of the Treasury had no power to grant one. It appeared, however, that they did grant him a pension, but they revoked it before he had ever received any money under their grant. Up to *April* 1833, he received full pay in respect of his office, and consequently the pension could not be granted till *August*, 1833. The parliament could not at that time vote his pension ; his name would not at that time appear in the estimates, but it did in the early part of the following year. In *February* of that year, the warrant, which had been previously given, was revoked. If the Lords of the Treasury had had the power to grant the pension, they could only grant it subject to be revoked under circumstances. They had not however any power to grant it. The circumstance of his name appearing in the estimates of the year following the grant of the pension, and of the money being voted, was not a mistake, for the officer was obliged to put in his name, on account of the warrant not having been revoked at the time when the estimates were made out. The appearance of his name in the estimates of the following year was a mistake. The whole sum mentioned in the estimates was voted, and that of course included this sum of 240*l.* There ought to have been another item of the clerk, that the pension was discontinued, but that is not material. If he was not entitled to it for the year, when it was regularly voted, *à fortiori* he was not entitled to it for the year when it was put by mistake into the estimates. I think that he was not entitled to it in either of these years ; I am therefore of opinion, that this rule must be discharged.

COLERIDGE, J concurred.

Rule discharged.

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## The GOVERNORS of the POOR of BRISTOL *v.* WAIT and others.

If the overseers of the poor of one parish occupy premises in another parish, they are liable to be rated in the second parish for such premises, though they are occupied solely for the benefit of the poor.

**REPLEVIN.** *Avowry*, first, that the taking was under the provisions of the statute of 43 *Eliz.* for the relief of the poor. Second, an avowry that the plaintiffs occupied premises in the parish of *St. Philip and Jacob*, and that a poor-rate was made on the 3d *March*, 1831, in which the plaintiffs were assessed at 35*l.* This avowry stated the summons, warrant of distress, and proceedings to enforce payment, and that the defendants were overseers of the poor of the parish of *St. Philip and Jacob*. Third, fourth, and fifth, the like avowries for three other rates. Sixth, an avowry in a similar form, stating the distress to have been for all the poor-rates. Seventh, an avowry reciting, that by an act of parliament, 1 *Will.* 4, the plaintiffs were empowered to buy property near the city of *Bristol*, for the purposes of the poor, and that such property was to continue liable to rates; that the plaintiffs bought a building called the armoury, and appropriated it to the use of the poor, and that the plaintiffs occupied the armoury and were liable to be rated for it. It then stated the rates and proceedings as before. Eighth: this avowry was nearly similar to the seventh. *Pleas*, to the first six avowries, *de injurid*; and to the seventh and eighth, there were pleas admitting the act of parliament mentioned in those pleas, with *de injurid* to the residue. The private act of parliament, 1 *Will.* 4, c. 4, which empowered the plaintiffs to buy lands and buildings for the use of the poor, recited, that in the parish of *St. Philip and Jacob*, a certain building called the armoury, and certain messuages, buildings and lands thereto belonging, and a certain close of ground adjoining thereto on the north and north-west sides, might be purchased at a moderate expense, for purposes connected with the management of the poor, and empowered the plaintiffs to buy those premises; and in s. 13 of that statute, after reciting that "when and so soon as the said lands, buildings, yards, premises, hereditaments and premises shall have been purchased by the said governor, deputy governor, assistants and guardians of the poor, and appropriated to the reception of paupers belonging to the city and county of the city of *Bristol*, under the provisions of this act, the same will not be subject and liable to such rates, taxes, and levies to which the same are now subject and liable. And whereas it is expedient that the same should be made subject and liable to such rates, taxes, and levies," it was enacted, "that the same lands, buildings, messuages, yards, hereditaments and premises then purchased and appropriated as aforesaid, shall be subject and liable to all rates, taxes, and levies to which the same are now subject and liable, but shall not be assessed to every such rates, taxes, or levies, at a higher rate or value than that at which the same lands, buildings, messuages, yards, hereditaments and premises are at the time of such purchase, rated or assessed." The poor of the parish of *St. Philip and Jacob* are managed under a local act of parliament, 38 *Geo.* 3, c. 69, and by the 22d section of that act, the vicar, churchwardens, and vestrymen of the parish of *St. Philip and Jacob* are to elect and to return to the justices acting for the district, three proper persons to serve the office of overseers of the poor, who are to be appointed "for the term of three years then next ensuing."

The plaintiffs appeared to be rated for the armoury at 100*l.* a-year, and for a lace manufactory in *Bread-street*, (which the plaintiffs also rented) at 28*l.* a-year. The armoury had been a military *depôt* in the hands of the crown, and, at the time when the plaintiffs bought it, was not rated at all. The paupers employed in the lace manufactory were paid for their work by the plaintiffs, who sold the lace. At the trial of the cause before *Alderson*, B., at *Gloucester*, at the Summer Assizes for 1834, the learned Baron was of opinion, that the plaintiffs were not beneficial occupiers; and that as the armoury was not rated at the time of the purchase, it did not become so on passing into the hands of the plaintiffs. A verdict was therefore taken for the plaintiffs, subject to a motion to enter a verdict for the defendants. A rule having accordingly been obtained,

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*Maule* and *W. Alexander* showed cause.—There was no beneficial occupation here, so as to render the plaintiffs rateable. It is said, that if persons having the management of the poor of one parish, take premises out of the limits of that parish, they are liable to be rated: for those premises might otherwise be occupied by persons who would pay rates for them. The same argument might be applied to premises used for public purposes, yet it is clear that buildings, such as *St. Luke's*, occupied for a public charity, or for a public purpose, as by a cavalry regiment, are not rateable; *Rex v. St. Luke's* (a), *Lord Amherst v. Sommers* (b). Upon the same principle the Masters in Chancery have been held not rateable, as occupiers of their respective apartments in *Southampton-buildings*; *Holford v. Copeland* (c). It is clear that the armoury here was not rateable; it was at one time occupied by a cavalry regiment stationed near the place; and since it was purchased by the plaintiffs, had been let to the corporation of *Bristol* for the purpose of putting soldiers into it. It was not rateable before the private act of parliament; now that act distinctly says, that premises in their occupation would not be subject to rates, &c., and then provides that such premises shall be subject to "all rates to which the same are now subject and liable." These words do not make property rateable which was not before rateable at common law, or under the statute of *Eliz.* In *Rex v. Terrott* (d), *Lord Ellenborough* said, "the principle to be collected from all the cases on the subject is, that if the party rated have the use of the building, or other subject of the rate, as a mere servant of the crown, or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of, or emolument resulting from it, in any personal or private respect, then he is not rateable." *Marshall v. Pitman* (e) will possibly be cited, to show that this action is not maintainable. The distinction between that case and the present is, that there the magistrates had jurisdiction, because the rate was alleged to be improperly made in point of form; but here, we say, that they had none, for that it ought not to have been made at all. In *Weaver v. Price* (f), it was held, that trespass lies if the party distrained upon has no land in the parish in which the distress is made. This action is therefore maintainable; and on the other point, it is clear that there was no beneficial occupation, since

(a) 2 Burr. 1053.  
(b) 2 Term Rep. 372.  
(c) 3 Bos. & Pul. 129.

(d) 3 East, 506.  
(e) 9 Bing. 595.  
(f) 3 Barn. & Adol. 409.



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one of the sections of the act declares, that no settlement shall be gained in respect of the property which the plaintiffs were thus empowered to purchase. As the defendants would suffer from no liability on account of this purchase, they are not entitled to any advantage on account of it.

*Ludlow*, Serjt., Sir *W. Follett*, *Maclean*, and *Greaves*, in support of the rule.—The cases cited in favour of the plaintiffs do not apply. In *Lord Amherst v. Sommers*, it was distinctly found that the plaintiff did not occupy. That is the question here. *Weaver v. Price* is itself an authority to show that if the party had had an interest in land in the parish where the distress was made, it would be good. If the poor were placed in a mill, and worked in grinding corn, and that mill was in a parish to which such poor did not belong, it cannot be pretended that it would not be rateable. The recital in the statute is not conclusive on this subject, *Rex v. Sutton (a)*. There is no other case in which the question of a beneficial occupation has been raised in trespass. The statute of *Eliz.* makes the party occupying liable; and it is clear that the plaintiffs were occupiers here, and were, as such, liable to be rated. In all the cases where this question has been raised, the fact of occupation by the party rated has been disproved, here it cannot be denied. Such was the case even in *Holford v. Copeland*, but there the case depended on a local statute, which expressly declared that the rate should be imposed on the proprietor of the building. The parties here have, at one time, made a profit of the armoury, and shall, therefore, be liable to rates in respect of it; *Rex v. Agar (b)*. There, the trustees of a Methodist chapel were held rateable, though they expended all that they received, for rent, and in repairing the chapel, &c., and obtained from it no profit whatever. Overseers of the poor, occupying for the use of their own parish, lands or premises within the limits of another, are therefore, like any other private individuals. They are occupying premises from which, if in other hands, the parish where such lands or premises lie would receive a benefit.

*Cur. adv. vult.*


Lord DENMAN, C. J., in this term, (9th May,) delivered judgment (c).—This was an action of *replevin* tried before Mr. Baron Alderson, when a verdict was given for the plaintiffs, but leave was reserved to the defendants to move to set it aside, and enter the verdict for them. There were no facts in dispute, and the case was brought before us with the view of raising several important points of law for our consideration. The most material of these is, whether the goods of the plaintiffs were improperly levied upon as a distress for poor-rates; that depended on the question whether the plaintiffs were the occupiers of rateable property in the parish of *St. Philip and Jacob*, in *Gloucestershire*. It appeared on the evidence, that the plaintiffs, the governors of the poor of the city of *Bristol*, had taken a certain building in the parish of *St. Philip and Jacob*, of the poor of which the defendants were directors, and that the plaintiffs had taken this building and the property attached thereto, simply for the purpose of lodging or employing the poor under their management, according to their discretion.

(a) 4 Maule & Selw. 543.

(b) 14 East, 255.

(c) This case was argued in *Hilary Term*, 1836.

On some part of the property the poor had been so employed; the property itself would clearly have been rateable, unless the kind of occupation, which existed in this particular case, exempted it from rateability. The question, therefore, is, whether the governors of the poor, renting property which would otherwise be rateable, are exempted from liability to rating, because such property is applied solely to the purpose of dispensing relief to the occupiers' poor. In this case references were made to cases of property held avowedly for public purposes; such, for instance, as the stables hired by the colonel of a cavalry regiment, and used solely for the purposes of the regiment, or the governors of a public charity, or the steward of *St. Luke's*, in which the property would in the first case be occupied solely for public purposes, and in the two last for charitable purposes, and would not be rateable on that account. We accede fully to the doctrine laid down in all that class of cases, but we observe that in all those cases it was admitted that such property, if applied at all to private purposes, became forthwith rateable; and of that, the case of the barracks hired by the colonel of a regiment furnished an instance. Beneficial occupation was said to be the true criterion of rateability. That is indeed a good criterion, and affords a popular and intelligible rule. If by beneficial occupation we were restricted to a profitable occupation, we could not say here that there has been a profitable occupation: but a beneficial occupation is nothing like it, for all the private occupiers of this property, though their occupation of it might have been ever so unprofitable, would have been liable to be rated. Thus the occupier of a coal mine has been held liable to rates, though the coal mine produced him no profit (a). Without, however, exactly presuming a liability from the mere fact of occupation, we think that that establishes a *prima facie* liability, which however may be explained away in each case. This was the case in *Rex v. Field*, where the coachman, occupying stables, was permitted to show that he occupied them only as the servant of his master, on whom the rate ought to have been made. In this case it was said that the plaintiffs ought not to be rated, because it would, in fact, be rating the poor; just as in the other cases it would have been in one instance the rating of the charity children, and in another the lunatics. But there is this difference between the cases, that it could not be said that the occupation was not a beneficial occupation, since the expense of the house or lodging of the paupers must have been, by some means, supplied to them. The occupation, therefore, is sufficiently beneficial to found the liability; but then it is said, that as this benefit was a benefit to the paupers, the rate ought not to have been imposed in respect of such an occupation. The benefit, however, was a benefit for what might, in the parish which imposed the rate, be called foreign paupers. How did it concern the poor, or the guardians of the poor of the parish, under the management of the defendants? for instance, out of what funds, and by what means were the poor of the next parish provided for? Suppose that the governors of the poor of *Bristol* took 100 acres of land in another parish, and from the produce of that land supported the poor, it cannot be contended that that land would not be rateable, because the produce of it was applied to the maintenance of the poor, who had laboured on the farm, or any of those who were unfit

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(a) *Rex v. Parrott*, 5 Term Rep. 593.

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for labour, and had been left behind: how could this constitute a better claim to exemption from rateability in the parish where the property lies, than a losing occupation, which it is quite certain does not affect the question of liability. The same rule must of course be applicable to every species of property. We are therefore of opinion, that the buildings so held by the plaintiffs in the parish of *St. Philip and Jacob*, were rateable to the relief of the poor of that parish; and that the verdict, according to the leave reserved, should be entered for the defendants.

Rule absolute.

### GRAVES v. HICKS.

Testator devised "to the use of my grandson *J. G.*, and his assigns, during the term of his natural life, without impeachment of waste, and immediately after the decease of the said *J. G.*," to trustees to support contingent remainders, "nevertheless to permit and suffer *J. G.* and his assigns, during his natural life, to receive the rents, issues, and profits; and immediately after his decease, to the use of the first, second, and every other son of the said *J. G.*, severally and successively in remainder, one after another, according to the priority of their respective births, and the heirs male of the body of such son, so that every elder of the same sons, and the heirs male of his body, shall always be preferred to every younger of the same sons and the heirs male of his body." By a codicil, he devised all his freehold, copyhold, and personal estate to his daughter *A. M. H.* for life, and after the determination of that estate, to his "grandson *J. G.* and his heirs, in strict entail, as in my said will directed: and in failure of issue of the said *J. G.*, he ordered that his said estate and effects should go and descend as is by his will directed."—*Held*, that under this will and codicil, *J. G.* took only an estate for life.

THIS was a case sent by the Vice-Chancellor for the opinion of this Court upon the construction of a will. The will was of *John Hicks*, of *Plomer Hill House*, in the county of *Bucks*, bearing date the 4th May, 1831, who after having made by his will a devise of his property for life to his wife &c., and other estate for life of different property, went on thus: "And as to the said manor and other hereditaments and premises last hereinbefore devised, the same shall, subject to the uses, estates, and charges hereinbefore mentioned, remain and be to the use of my grandson, *John Graves*, the only son of my late daughter, *Sophia Elizabeth Graves* deceased, by *Charles Gray Graves*, and his assigns, during the term of his natural life, without impeachment of waste, and immediately after the decease of the said *John Graves*," to trustees to support contingent remainders, "nevertheless to permit and suffer the said *John Graves* and his assigns, during his natural life, to receive the rents, issues and profits of the said manor and other hereditaments and premises, and immediately after his decease, to the use of the first and second, and every other son of the said *John Graves*, severally and successively in remainder, one after another, according to the priority of their respective births, and the heirs male of the body of such son, so that every elder of the same sons, and the heirs male of his body, shall always be preferred to every younger of the same sons and the heirs male of his body." The testator made several codicils, but the fourth is the only one that appears to be material to the question, and that run thus: "And I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicils, of all my freehold, copyhold, and personal estate and effects, of all and every kind and description, and instead, and in the place of such devise, disposition, and bequest, therefore, I do give, devise, and bequeath all and every my freehold, copyhold, and personal estate and effects of every kind and description, whatsoever and wheresoever situated, unto my daughter, *Anna Maria Hearle*; and from and after the determination of that estate, I give, devise, and bequeath the same unto my grandson, *John Graves*, and his heirs, in strict entail, as in my said will

directed, with especial and positive orders, that in case the said *John Graves* should not be 31 years of age at the time my said estate shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of 31 years, but that the rents thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs; and in failure of issue of the said *John Graves*, I order that my said estate shall go and descend as is by my will directed, &c." The testator died the 21st June, 1825. At his death, *John Graves* and *Anna Maria Hearle* were the heirs at law of the testator, the first being the only child of a deceased daughter of the testator, and *Anna Maria Hearle*, the only child of the testator living at his death. The testator's grandson, *John Graves*, is living, and is unmarried, and was born the 25th January, 1811. *John Graves* having by his next friend, in November, 1835, instituted a suit in the Court of Chancery against the widow, *Francis* and *Anna Maria Hearle* and the trustees, to have the will and codicils ascertained, upon the cause of *Graves v. Hicks* coming on to be heard before the Vice-Chancellor, it was insisted on the part of the plaintiff, *John Graves*, that under the testator's fourth codicil, the plaintiff, *John Graves*, was tenant in tail general of the testator's estates in *Buckinghamshire* and *Cornwall*; and on the part of the defendant, it was contended that *John Graves* was tenant for life only.

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The *Attorney-General*, for the plaintiff.—Under the will and codicil, *John Graves* took an estate tail general upon the determination of the estate for life. The fourth codicil enlarged the estate to that extent. The other side must show the intention of the testator to have been, that the daughter of the grandson, or the sons who had daughters, should not take upon the death of *John Graves*, but that the estate should go over to *Anna Maria Hearle*; this is contrary to the manifest intention of the testator, for after the death of his only son, *John Graves* and his family were the objects of his bounty. The will had originally given nothing more than a life-estate to *John Graves*. The fourth codicil in effect revoked that will, and gave a life-estate in the whole property to *Anna Maria Hearle*; but in compensation for this interposed estate, *John Graves* was to take an estate of inheritance; this intention is clearly expressed by the words "to *John Graves* and his heirs in strict entail." The word "heirs," coupled with a freehold in the ancestor, necessarily creates an estate tail. If the testator had any other intention, it would have been sufficient for him to say, "after the death of my daughter, *Anna Maria Hearle*, the said estates to go over to *John Graves*, as expressed in my will." The same intention is manifested by the devise over after the estate of *John Graves*, which is not in default of issue male, but on "failure of issue" generally. These words carry an estate tail; *Jesson v. Wright* (a), *King v. Rumball* (b), *Robinson v. Robinson* (c). In the last case there was a devise of all the testator's real estate to *A. B.* for life, provided that he took the name of *Robinson*, and after his decease, to such son as he should have, lawfully to be begotten, taking the name of *Robinson*; and for default of such issue then over; it was held, that *A. B.* took an estate in tail male; that case has been held good law ever since *Coulson v. Coulson* (d) decided the same point,

(a) 2 Bligh, 1.

(b) Cro. Jac. 448.

(c) 1 Burr. 38.

(d) Strange, 1125.

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although trustees were there interposed between the estate for life and the devise over to the issue. Where the general intention of the testator is, that the estate should not go over till an indefinite failure of heirs of the first devisee, that devisee takes an estate tail; *Doe d. Wright v. Jesson* (a), *Roe d. Thong v. Bedford* (b), *Doe d. Blanford v. Applin* (c), *Doe d. Cole v. Goldsmith* (d). In the last of these cases it was said (e), "It is an established rule, that where a general intent appears, any particular intent, however clearly expressed, shall never take effect where it is inconsistent with the general intent." In this case the particular intent is not clearly expressed; the general intent is. There was a case in the House of Lords (f) where the word "heirs" was held tantamount to son or sons. The class of cases where that rule is laid down will be found collected in *Jarman's* edition of *Powell on Devises* (g). The whole doctrine was discussed in *Lisle v. Grey* (h), and *Goodtitle d. Sweet v. Herring* (i).—[Coleridge, J.—Suppose the words had been "my grandson J. G. and his heirs, in strict settlement, as in my said will," what would have been the effect of it; would it not have tied up the earlier expression?] Perhaps it might; but here the devise has not given rise to such a doubt, for the words must be taken to be used in a technical sense; *Poole v. Poole* (k). The other side must put a limited construction upon the words "failure of issue of John Graves," so as to exclude the daughters of John Graves, and all the female issue of the sons of John Graves; but such an interpretation would entirely defeat the intention of the testator. In *Langley v. Baldwin*, the best account of which is given in *Peere Williams* (l), the Court held the words "in case A. should die without issue male of his body," did in a will make an estate tail. The same rule was held in *Halanson v. Clitheroe* (m), and *Banks v. Holme* (n). It cannot be contended, therefore, that as in *Doe d. Beane v. Halley* (o), the words gave an estate for life to John Graves, with remainder in tail male to his first and other sons. In that case the testator showed a decided preference to the male line, which he has not done here, and there is no reason for supposing that the daughters of John Graves, or the daughters of the sons of John Graves, were intended to be excluded. The codicil gives the estate tail at once to John Graves, and all his issue take through him in the character of heirs. This, therefore, is an estate tail general on the determination of the life of Mrs. Hearle.

*Cowling, contra.*—John Graves took an estate for life, with remainder to his first and other sons, and then a remainder over. The fourth codicil made no difference in the will, and the estate given to John Graves's children was only an estate tail male, and not an estate tail general. The fourth codicil was made because John Graves was at that time quite a child, and the testator desired to prevent the evil of such a boy becoming possessed of considerable property, before he knew how to manage it, or protect himself. The House of Lords has already had this will before it (p), and has decided

(a) 5 Maule &amp; Selw. 95.

(b) 4 Maule &amp; Selw. 362.

(c) 4 Term Rep. 82.

(d) 7 Taunt. 209.

(e) Id. 212.

(f) *Jack v. Featherstonhaugh*, sess. 1835.

(g) Vol. 2, p. 845.

(h) Sir T. Raym. 278, 302, 315.

(i) 1 East, 264.

(k) 3 Bos. &amp; Pul. 620.

(l) 1 Peere Wms. 759.

(m) 1 Ves. sen. 24.

(n) 1 Russ. 394.

(o) 8 Term Rep. 5.

(p) *Doe d. Hearle v. Hicks*, 1 Clark & Finn, 21.

that the words in the fourth codicil are to be confined in their meaning to what is called the residue. If an estate tail is implied in the plaintiff, the residuary clause is nonsense, for the holder of an estate tail may bar the remainder.—[*Patteson, J.*—Yet in one part of the will he gives the estate to his son for life, and to his son's heirs in tail, and then the remainders over.—*Coleridge, J.*—And if the argument was decisive, it would apply in a thousand cases.]—The testator clearly meant that his large funded property should go in the same way as his landed property, and in disposing of one, as well as of the other, he uses the word "heirs." It is clear, therefore, that a technical sense cannot be affixed to that word. Where there is a devise of an estate to a person for life, and then a clause containing the phrase, "on failure of issue," that must mean on the failure of such issue as has been before mentioned. This was evidently the son or sons of *John Graves*. *Langley v. Baldwin*, and *Doc d. Beane v. Halley*, do not support the doctrine for which they are cited. In *Blackburn v. Hewer Edgley (a)*, the Court held, that where lands are devised to *A.* for life, remainder to trustees, remainder to his first, &c. son in tail male; and if *A.* dies without issue, then, &c.; this will not give an estate tail to *A.*, but the words "without issue" must be intended "without such issue." The intention of the testator as to the "heirs" and "issue," is shown in the words "it shall be lawful for my said son and grandson respectively to charge the residuary estate for the benefit of younger children." In *Morse v. The Marquis of Ormond (b)*, it was held, that the words "on failure of issue" had no general meaning, and the subsequent appointments for legatees were held to take effect. This case was confirmed by the Chancellor upon appeal (*c*). On all these authorities, it is clear that the "failure of issue" is a mere repetition of the words "such issue." The intention of the testator, after the failure of part of his family, was to give a larger estate than before to *Mrs. Hearle*, and therefore he did not give so large an estate as is now contended for to *J. Graves*. It is not, therefore, necessary to discuss the cases of *Robinson v. Robinson*, and *Coulson v. Coulson*, for the intention of the testator is expressed with sufficient clearness to take away the necessity of the Court deciding by implication. *Jack v. Featherstonhaugh* is not applicable to the present case, for the only question there was, whether the devisees took by purchase or by descent, for if by descent, it was clear that it was an estate tail. There are two ways of looking at this codicil. It might be said that the testator changed his intention and converted a life estate into an estate tail; but the more natural reading of it is, that *John Graves* would have an estate for life, with remainder to his first and other sons. *Bennett v. Lowe (d)* is an authority for thus construing it. There the use of the words "in default of issue" was held not to enlarge a prior estate for life. The fourth codicil deprives *John Graves* of several advantages. What ground is there then for saying that it was meant to enlarge his estate. Lord Chief Justice *Tindal*, in the course of his judgment on this very will (*e*), says, that it is obvious that the fourth codicil was made by the testator without legal assistance. Why then give to the words it contains a technical meaning, which will make them

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(a) 1 Peere Wms. 600, 605.

(b) 5 Madd. 99.

(c) 1 Russ. 382.

(d) 7 Bing. 535.

(e) 8 Bing. 488.

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convey an enlarged estate contrary to the intention of the testator, as expressed in other parts of the will.

The *Attorney-General*, in reply.—The decision on this case in the House of Lords turned on a totally different point, and cannot affect the present argument. What the testator has said in the other codicils cannot affect the present, for it was made under different circumstances, and was therefore framed with a different intention. None of the cases cited support the proposition contended for on the other side. In *Bennett v. Lowe*, no reasons are given for the judgment, but from the course of the argument it is manifest that the Court decided it on the plain principle of giving effect both to the general and particular intent of the testator. That cannot be done here, and it is clear that none of the children of the first devisee were intended to be deprived of the bounty of the testator.

On the 2d February, 1836, the following certificate was sent to the Vice-Chancellor :—

" This case has been argued before us by counsel, and we are of opinion that the plaintiff, *John Graves*, takes an estate for life in each of the estates in *Buckinghamshire* and *Cornwall*, under the will and codicils mentioned therein.

" J. PATTESON,  
J. WILLIAMS,  
JOHN TAYLOR COLERIDGE."

(a) Lord Denman, C. J. was not present at the argument, having been obliged to attend the King in Council at Brighton.


Bail Court.

ALDER v. PARK and IVESON.

An action against executors, who pleaded *plene administravit*, was referred to arbitration, pending which a third person recovered judgment by default against them in another action; the Court then allowed this judgment to be pleaded as a plea *puis darrein continuance* before the arbitrator.

THIS was a rule to show cause why the order of reference in the cause should not be revoked, unless the plaintiff would consent that the defendants should be at liberty to plead a plea *puis darrein continuance* before the arbitrator in the cause, and that without the affidavit stating that the matter arose within eight days next before the pleading of such plea; and why the order of reference should not be amended so that the defendants might only be liable as executors, and the submission to arbitration not be an admission of assets. The action was brought on the 31st of October, 1833, against the defendants as executors. The testator had conveyed an estate to the plaintiff, and had covenanted that it was tithe free, and that a certain modus was good. It was for breach of this covenant that the action was brought. There had been a plea amongst others pleaded, that the land was in fact tithe free, but that plea had been withdrawn, and the cause had been referred to an arbitrator on a plea of *plene administravit*, whether the defendants had assets, and what amount of damages the plaintiff had sustained. The order of reference was dated the 10th of July, 1834. It appeared that there had been a tithe suit instituted against the plaintiff to recover the tithe of the land in question, which had lasted for ten years, and was ultimately decided against the plaintiff. The assignees had in their hands a sum of 1200*l.* and also a dock share, which had been specially bequeathed by the defendants' testator. Various questions as to what were assets in the defendants' hands, and

other matters arose for the arbitrator's decision, and on the 19th of June, 1835, pending the reference, an action had been brought on a bond against the defendants as executors. It was an adverse proceeding for a *bond fide* debt, and was not brought by collusion with the defendants. The defendants confessed the action, and judgment was signed on the 2nd of August. No award had yet been made; it was the intention of both parties that several questions of law should be raised on the award, in order to obtain the opinion of the Court. The arbitrator had enlarged the time for making his award, in order that this application might be made to the Court.

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*Tomlinson* showed cause.—The object of the defendants is to plead the judgment recovered against them in the second action, which will have the effect of preventing the plaintiff recovering the amount of his claim. It was the defendants' own fault that judgment was recovered against them in the action on the bond, though they had no defence to make to the bond itself. It is now acknowledged that the defendants have a sum of 1200*l.* and a dock bond in their hands; they ought therefore to have confessed assets to that amount in this action, and then they might have pleaded in the action on the bond, that they had already confessed assets to that amount in an action that was still pending. Such a plea was held to be good in the case of *Waters v. Ogden (a)*. Having disabled themselves from pleading such plea in the second action, by having denied assets in this action, the defendants might yet have made application to a judge to amend the plea in this action, for the purpose of pleading such a plea in the second action. They have neglected to do so, and the Court will not now interpose and give the plaintiff in the second action all the benefit of these assets, the plaintiff in this action not being in fault at all. The defendants also, by their false pleading, have deprived themselves of the interposition of the Court. The defendants' only remedy is by application to a Court of Equity. The opinion of Sir *James Mansfield*, in the case of *Brady v. Sheil (b)*, shows, that by application to a Court of Equity the defendants might have compelled these parties to take an equal distribution of assets. The latter part of this rule, as to the liability of the defendants as executors, is unnecessary, and under the circumstances this Court will not interfere, but will leave the defendants to their remedy in a Court of Equity.


*Wightman, contrd.*—All that the defendants ask for is, that they should not be placed in a worse situation, the cause having been referred to arbitration, than they would have been had the cause been still pending before the Court. Had this cause been still so pending the defendants would clearly have been entitled to plead the judgment recovered in the second action, as a plea *puis darrein continuance*. The defendants admit they have assets to a certain amount, and it is immaterial to them to whom they are paid. By the judgment in the second action they cease to be assets in their hands, and they were perfectly justified in not defending that action if they had no valid defence. The case of *Prince v. Nicholson (c)* is an authority to show that executors may plead *puis darrein continuance*, a judgment recovered in an action subsequently commenced against them, in which they had suffered judgment by default. A plea in the second action, similar to that pleaded in

(a) Dougl. 435.

(b) 1 Campb. 148.

(c) 5 Taunt. 665; 1 Marsh. 280.



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the case of *Waters v. Ogden*, would not have protected these assets, this action being for unliquidated damages. Had these defendants confessed these assets instead of denying them, in the first instance, the plaintiff would not have been entitled to them, but the cause would still have proceeded on the merits, to ascertain what the plaintiff was entitled to. Suppose this second action had then been brought, the defendants must have pleaded assets to the same amount, and judgment having been recovered in this action this same application must have been made, so that by the denial of assets there has been no alteration in the relative state of the parties. Perhaps, after all, the plaintiff in this action may not be entitled to recover any thing whatever. The only question to be decided is, whether or not the defendants are entitled to this plea.

WILLIAMS, J.—The only part of this rule which I am disposed to accede to, is that part which respects the question of how far, under the circumstances of the case, the judgment recovered in the second action should be allowed to come before the arbitrator, with reference to the effect of it. The latter part of the rule, which seeks to keep the party from a liability to which he is subject, I see no reason for, as it is the immediate result of the submission to the arbitration. The former part of the rule seeks to place the defendants in the same situation they would have been had the cause been still pending before the Court, instead of being referred. So far it appears to me to be fair and reasonable to grant the rule; for if the defendants are allowed to plead the judgment in the second action as a plea *puis darrein continuance*, the effect of such a plea will still remain open for the arbitrator. To that extent, therefore, I am inclined to make this rule absolute. The rule will be absolute, therefore, as to the pleading *puis darrein continuance* only.

Rule absolute accordingly.

### HARDING and others v. MANNERS.

*Distringas* for the purpose of proceeding to outlawry granted, although three calls had not been made at the defendant's place of abode.

THIS was an application for a *distringas*, for the purpose of proceeding to outlawry against the defendant. The following circumstances appeared on the affidavit. The defendant left this country four years back, with intent to delay his creditors. Shortly afterwards all his goods were sold, and he now possessed none in the country. The house where he had last resided, after being about two years unoccupied, came into the possession of the defendant's brother. The affidavit also stated positively that the defendant had ever since resided in *France* with the intention of delaying his creditors. The deponent had made inquiries about the defendant at his last place of abode, and was told that it was not known when he would return. He afterwards went over to *France*, but was unable to meet with him. A pluries summons issued on the 18th of *April*.

G. T. White.—Under these circumstances the object of the *distringas* being to proceed to outlawry, and not for the purpose of compelling an appearance, it is unnecessary to comply with the usual practice requiring

those calls to be made at the defendant's residence. In the case of *Jones v. Price* (a) the Court said, "There may be sufficient to entitle you to have a *distringas* to proceed to outlawry, when you would not be entitled to a *distringas* for appearance." This is a stronger case, as it is positively sworn the defendant's object in going to *France*, and continuing there, was for the purpose of delaying his creditors.

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WILLIAMS J.—I must grant the rule under those circumstances.

Rule absolute.

(a) 2 Dowl. P. C. 42.

### MASTERS v. TICKLER.

THIS was an action of *assumpsit*, to which the defendant pleaded *non assumpsit* and a tender, and paid money into Court. The jury found a verdict for the plaintiff for 6*l.* beyond the sum paid into Court, which, together with the sum paid into Court, exceeded 20*l.* The Master taxed the costs as if the verdict had been for more than 20*l.*

A plaintiff having recovered by verdict a sum of money beyond another sum paid into Court, the two sums together amounting to more than 20*l.*—*Held*, that the taxation of costs ought not to be on the reduced scale ordered in *H. T. 4 W. 4.*

*Platt* moved for a rule to show cause why he should not review his taxation. He submitted that the verdict having been for 6*l.* only, the costs ought to have been taxed according to the reduced scale given in the directions to the taxing officers in *H. T. 4 W. 4.* (a).—[*Williams, J.*—The words of the direction are, "Where the sum recovered or paid into Court, &c." That is so worded to meet the two cases, first, where a sum is paid into Court and accepted by the plaintiff in satisfaction of his whole demand, and secondly, where the plaintiff recovers by verdict alone; but will not meet this case when part is paid into Court and part recovered by verdict, so making together more than 20*l.*

WILLIAMS J.—I must think that both the sums are a portion of the sum recovered in the action, and therefore the whole amount recovered being above 20*l.*, it seems to me that the taxation ought not to be on the reduced scale.

Rule refused.

(a) 2 Dowl. P. C. 489.

### The KING v. CONNOP and others.

THE defendants were indicted at the Central Criminal Court for a conspiracy to defraud *Levy* from having the benefit of his property in the *Victoria Theatre*. A *certiorari* had been applied for by some of the defendants to remove the indictment into this Court, on the ground that it would involve

*Certiorari* to remove an indictment from the Central Criminal Court granted, although one of the defendants

did not consent to it, his appearing to collude with the prosecutor.

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several questions as to the rights in the property which were also about to be discussed in a bill that was pending inequity between the same parties, and that it was necessary to have a special jury (a). It then appeared that the defendants, eight in number, had not all given their consent to the indictment being removed. Time having been given to obtain the consent of the others :

The *Attorney-General* and *Hoggins*, on the part of some of the defendants, renewed the application, on an affidavit stating, that the consent of all, except one, had been obtained, and that the deponent believed that one colluded with the prosecutor in order to prevent the removal of the indictment. They contended that under these circumstances it was not necessary to have the consent of that one defendant, according to the general rule laid down in *The King v. Hunt* (b) and *The King v. Caldecott*. (c)

*Humfrey* consented to the application, on the part of the other defendants, except the one mentioned.

*Platt contrà*, showed cause in the first instance, and contended that the case of *The King v. Hunt* was an authority to prove that it was absolutely necessary to have the consent of all the defendants ; and that such was the opinion of this Court, when this application was first made, was shown by the Court giving time for obtaining the consent of all the defendants.

WILLIAMS J.—Ordinarily speaking a *certiorari* is granted on an *ex parte* statement, but it is more desirable that the affidavits of both parties should be before the Court, and that course has been adopted in this instance with a view to conform to the cases of *The King v. Hunt* and *The King v. Caldecott*. I gave time to see if all the defendants would concur in this application, but I did not then say that if the consent of any one were not obtained I should not allow a *certiorari* to issue. In the case of *The King v. Hunt* the matter stood over to obtain the consent of all the defendants, and the same has been done here. Now, I am to judge on the whole matter as to the reason given for the non-compliance of one of the defendants, and it seems to me on these affidavits (which are put in in the same course as was observed in *The King v. Hunt*), that I ought not to prevent a *certiorari* issuing, so as to obtain a more full inquiry into a case which is as fit as any other that could be named to be tried before this Court.

Certiorari granted.

(a) *The King v. Wartnaby*, 2 Adol. & Ell. 435.  
 (b) 2 Chit. Rep. 130.

(c) 3 Dowl. P. C. 315.

### SMITH v. ALEXANDER.

A person, in order to obtain fresh credit, offered to give a warrant of attorney for the amount, as well as for an old debt, for which he had been discharged under the Insolvent Act, and on his solicitation the creditor was induced to take it and give the credit :—*Held*, that the warrant of attorney was not good for the amount of the old debt.

THE defendant had been discharged under the Insolvent Act, 7 Geo. 4. c. 57, and in his schedule had inserted a sum of 27*l.* as due by him to the plain-

tiff. After his discharge, the defendant applied to the plaintiff for some goods and for the loan of some money, and in order to induce him to give him the credit he wanted, he himself proposed to give a warrant of attorney for the amount of what he was in want of, and also for the old debt of 27*l*. The plaintiff was accordingly induced to lend him the money and advance him the goods, and took a warrant of attorney, as the defendant proposed, for 48*l*., which included the whole debt of 27*l*. Judgment having been entered up, and execution issued on this warrant of attorney, a rule was obtained last term to show cause why the warrant of attorney should not be set aside and delivered up to be cancelled, and why satisfaction should not be entered for the sum of 27*l*., for which the defendant had been discharged under the Insolvent Act, being part of the sum for which the warrant of attorney had been given, and why it should not be referred to the Master to ascertain what was due to the plaintiff, and why he should not pay the costs of the reference to the Master, and of this application. The rule having been enlarged until this term,


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*Humfrey* showed cause. This warrant of attorney was perfectly legal, and was not in contravention of the Insolvent Debtors' Act, 7 *Geo. 4. c. 57*. The amount for which it was given is like a new debt, although the old debt of 27*l*. was included. This is not a case where a creditor has pressed an insolvent, and has procured for him a security for a debt, from which he has been discharged under the Insolvent Act. Here the proposal to give the warrant of attorney originated entirely with the defendant; his only object was to induce the plaintiff to give him fresh credit, and it was only on the defendant's solicitation that the plaintiff complied with his request. There was, in consequence, a *bond fide* loan of money, and advance of goods, by the plaintiff to the defendant; and, under these circumstances, this warrant of attorney is not within the 61st section of the Insolvent Act. It appears, also, that by the latter part of that section, that the course which the defendant should adopt to take advantage of it, is to plead his discharge; he cannot therefore have the remedy sought for by this rule.

*C. C. Jones, contra*.—This claim is not good in law. By 7 *Geo. 4. c. 57, s. 61*, it is provided, that no *feri facias* shall issue in any action, upon any "*new contract or security*," for payment of any debt for which the defendant has been discharged under the act. This warrant of attorney is a new security, and the act is conclusive, that no execution shall issue on it. It is said, that the plaintiff was induced to take the warrant of attorney on the solicitation of the defendant; but that will not avoid the act, or make this security legal. The case of *Evans v. Williams* (a) is conclusive as to this question. That was a case of a new contract on an old debt; and Lord *Lyndhurst* says, "The defendant executes a fresh note, including the same sum of money. That note was for the same debt, or sum of money, for which the defendant was liable before. The 7 *Geo. 4. c. 57, s. 61*, enacts, that no action shall be brought for any such debt or sum of money, or upon any new contract or security for payment thereof. Now, is not this a new contract for the same debtor sum of money? The only new ingredient is an additional consideration thrown

(a) 1 *Crompt. & Mees*. 30.

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in." So here, although there has been an additional consideration thrown in, it will not make the security valid. The intention of the act was to insure that any future effects of the insolvent, obtained after his discharge, should be divided rateably amongst his creditors, and that no one of them should be preferred before the others. The effect of this warrant of attorney is to give the plaintiff a preference ; and this rule must, therefore, be made absolute.

WILLIAMS, J.—It seems to me that the language of the act is very strong, and the case cited shows that the Courts will act to the extent of that language, which is large and general in the extreme. Section 61 provides, that "no writ of *feri facias*, or *elegit*, shall issue on any judgment obtained against such prisoner, for any debt or sum of money with respect to which such person shall have so become entitled ; nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act." The form mentioned in that exception has not been followed here. Here a warrant of attorney has been given ; I grant that it was at the particular request of the defendant, and for the purpose of getting a fresh loan of money and new credit, but it was without a reserve of the amount of the old debt. Now, is it possible for me to say, this is not a new security for the payment of a portion of that for which the defendant has been discharged ? Mr. *Humfrey* has observed, on the latter part of the section, that if an action is brought, the defendant must plead his discharge under the act. That certainly is the case ; and, if an action had been brought, that is the mode he would have been obliged to adopt, as was done in the case of *Evans v. Williams*. But here a plea is out of the question, as the defendant has had no opportunity of pleading it ; and, therefore, if the judgment on this warrant of attorney is not to be set aside, on an application like the present, then this new security is wholly without the means of impeachment. The language of *Bayley, J.* is strong in the case referred to. "It has been urged, that the defendant, after his discharge, was in the same situation as any third person. I think that he stands in a different situation, and that the act of parliament prevents him from incurring this liability in the manner in which another person might have done." He was clearly of opinion, that that argument would not apply to such a party. I also think that the language of the act is too strong, and that, in whatever shape a party tries to get a new security, that it would be void to the extent for which the prisoner had been discharged under the Insolvent Act. This warrant of attorney, therefore, must be set aside to the extent for which the defendant was discharged, and can only stand for the new consideration. It must be referred to the Master to ascertain what is due on the new consideration. I shall say nothing about costs, as it was the defendant himself who solicited the plaintiff to take this warrant of attorney, in order to induce him to give the new credit.

Rule absolute accordingly (a).

(a) See *Gould v. Williams*, 1 Har. & Wol. 344, and 4 Dowl. P. C. 91.

Bail Court.

## Ex parte LAWSON.

**M**R. *Lawson* had served his time with Mr. *Bicknell*, who was a solicitor of the Court of *Chancery*, but was not an attorney of this Court. He had given the proper notices for his admission as a solicitor in the Court of *Chancery*, which would entitle him to be so admitted on the last day of this term. He would then be entitled, as a matter of course, under the practice as it existed previous to the late rules, which had not yet come into force (a), to be admitted an attorney of this Court any day next term.

An attorney who wanted to go abroad to practise, allowed to be admitted on the last day of the term previous to that in which he would strictly have been entitled.

Sir *William Follett* now (*May 5th*) moved that he might be admitted instead on the last day of this term (*May 9th*), under these circumstances:—A person who had been practising as an attorney at *Paris* was lately dead, and Mr. *Lawson* had been requested to go there and take his business, which he was about to do. It was necessary he should be admitted as an attorney of this Court; and if he was not now admitted, it would be necessary for him to come over from *Paris* during next term. That would be very inconvenient, as there was much business which required his personal attention. He referred to the case of *Ex parte Hulme (b)* as a case where a similar application was granted.

**WILLIAMS, J.**—It seems to me that if there is ever a reason for dispensing with the general rule, this is such a case.

Rule for his admission on the last day of the term.

(a) See these rules, 1 Har. & Wol. p. 637. (b) 1 Har. & Wol. 366, and 4 Dowl. P. C. 88.

## MARGETSON v. TUGGHE.

**T**HIS was a rule to show cause why the defendant should not be discharged out of custody on filing common bail, for irregularity. The irregularity complained of was, that in the affidavit to hold to bail, and in the *capias*, the defendant was called “——— *Tugghe*,” without any Christian name, and without any description whatever. The affidavits in answer, stated the different inquiries that had been made to ascertain the name of the defendant, who was a foreigner, and did not reside in this country, but was only here for a temporary purpose. The cause of action, also, appeared to have arisen in *France*.

It is necessary that some residence of the defendant should be stated in a writ of *capias*.

*Chilton*, showed cause.—The affidavits in answer sufficiently account for the defendant's Christian name and residence not being inserted. All reasonable inquiries have been made, and due diligence has been used to find them; and the case of *Hicks v. Marreco (c)* is an authority to show that sufficient inquiries have been made in this case. In the case of *Clothier v. Ess (d)* the affidavit was not entitled in the cause, and that therefore is not a

(c) 1 Crompt. & Moss. 84.

(d) 2 Dowl. P. C. 731; 3 Moore & Scott, 216.

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case that applies here.—[*Williams, J.*—Are you aware of any case where a *capias* has been held to be good that contained no description whatever of the defendant?]*—It is probable from the nature of the case, although the report says nothing on the subject, that in Hicks v. Marreco the capias was in the same form that the affidavit of debt was. In Hill v. Harvey (a) it was held sufficient to state in a capias the defendant's late place of residence.*

*J. J. Williams, contra*, referred to the cases of *Finch v. Cocken (b)*, *Bosler v. Levi (c)*, and *Price v. Huxley (d)*.

*WILLIAMS, J.*—I shall take time to consider, as I think it probable there may be found a distinction between a *capias* and a summons, as observed by *Taunton, J.* in the cases of *Welsh v. Langford (e)* and *Buffle v. Jackson (f)*.

*Cur. adv. vult.*

*WILLIAMS, J.* the next day (*May 6th*) gave judgment.—With reference to the affidavit to hold to bail, my impression is rather in favour of *Mr. Chilton's* argument, that the explanation given on his affidavits, for not giving a better description, is satisfactory; but the question arises on the *capias*. The *capias* is "*——— Tugghe*," without any thing more; and the question is, whether or not a name, without any description whatever, is sufficient in a *capias*. Now, in the early cases which arose on the Uniformity of Process Act, 2 & 3 *Will. 4*, c. 39, a distinction was taken between the form of the summons and of the *capias*, and this distinction was founded on the language of the 1st and 4th sections of the act. The 1st section has reference to the writ of summons, the 4th to the *capias*. In the 1st, by the section itself, it is enacted, that "in every such writ and copy thereof, the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be, or shall be supposed to be, shall be mentioned." Therefore, in the writ of summons, by the section itself, there is an express direction that the residence of the defendant shall be mentioned; but in the 4th section, which has regard to the *capias*, there is no such direction. There it is enacted, that the writ of *capias* should be "according to the form contained in the schedule marked No. 4." In the cases of *Welsh v. Langford* and *Buffle v. Jackson*, I find a distinction was taken between the 1st and 4th sections of the act; and that it was held, that a great generality of description provided there was some was sufficient (*g*). In the first of those cases this description: "*Captain Langford, of the Honorable East India Company's Ship Kelly Castle, and now most likely to be found at the East India House in London,*" was held sufficient; and there could not surely be a more general description. In the case that has been lately decided of *Hill v. Harvey*, I observe that the only two judges who gave their reasons state, that the description of the defendant in the *capias* is intended for the guidance of the sheriff. But I do not myself see how "*late of Launceston, in the county of Cornwall,*" could be any assistance to the

(a) 1 Gale, 185; 4 Dowl. P. C. 163; 2 Crompt. Mees. & Ros. 307.

(b) 1 Gale, 130; 3 Dowl. P. C. 678; 2 Crompt. Mees. & Ros. 196.

(c) 1 Bing. N. C. 362.

(d) 2 Crompt. & Mees. 211.

(e) 2 Dowl. P. C. 498.

(f) 2 Dowl. P. C. 505.

(g) See also *Morris v. Davies*, 1 Har. & Wol. 513; 4 Dowl. P. C. 317.

sheriff of *Middlesex*; or, "late of *Brussels*, in the kingdom of *Belgium*," could assist the sheriff of any county? The probable reason on which those cases were decided may be found by examining the schedule No. 4. By the form there given the sheriff is directed to "take *C. D. of* ———, if he be found in your bailiwick, &c." That form being part of the act itself, the word "of," there found, has been held in the case of *Hill v. Harvey* to be intended as a *designatio personæ*, from whence it follows that some description is necessary. That seems to be the reason of those decisions; but, however that may be, this very point has been decided two days since in the Court of *Exchequer*, in the case of *Ward v. Watts* (a). In that case, as in this, there was no vague, uncertain, or rambling description of the defendant in the *capias*, but none whatever. The *capias* having been held defective in that case, I am bound to say, that here this *capias* also, having no description of the defendant whatever, is defective. The rule must be made absolute, on the terms of no action being brought. I shall make no order as to the costs.

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Rule absolute accordingly.

(a) 5 Dowl. P. C. 94.

#### LASHMAR v. CLARINGBOLD.


THIS was a rule obtained by the sheriff under the Interpleader Act, 1 & 2 Will. 4, c. 58. The affidavit, on which the rule was granted, stated, that on the 19th of *January* a *fi. fa.* issued, indorsed to levy the sum of 82*l.* 9*s.* 10*d.*, and that on the same day it was put into the sheriff's hands. It also stated, that the sum of 82*l.* 9*s.* 10*d.* had been received by the sheriff in satisfaction for the goods seized; but did not state when the sale had taken place, what was the whole amount received for the goods, or when this sum was received by the sheriff. On the 17th of *March*, notice of a fiat having issued against the defendant, and that the money in the sheriff's hands would be liable to the claim of the assignees, was delivered to the sheriff. Application had since been made, by the solicitor for the assignees, for the money, and on the 15th of *April* the sheriff was ruled by the plaintiff in the cause to return the writ. The execution was on a judgment upon a warrant of attorney.

The Court refused to give a sheriff relief under the Interpleader Act, where a *fi. fa.* was delivered to him two months before notice of a fiat having issued against the defendant, and no reason was assigned for the delay in the execution.

*Channel*, for the assignees under the fiat.—The sheriff is not entitled to the relief sought for by this rule. It does not appear when the sale of the goods, taken in execution, was effected. The sale, therefore, might have been after the act of bankruptcy, and then it would be wholly void as against the assignees. The assignees are entitled to the whole value of the goods, and it does not appear what that was. If any issue at all is directed to be tried, it must be for the value of the goods sold.

*C. Turner*, for the execution creditor.—The affidavit on which this rule was granted is very unsatisfactory, as it does not appear when the sheriff received the money for the goods. It may be, that he received the money two months before he had notice of the fiat. This is an execution on a war-



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 LASHMAR  
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rant of attorney; and if the act of bankruptcy was committed before the sale of the goods, the money belongs to the assignees; but if after, to the execution creditor, even though the money has not been paid over by the sheriff; *Morland v. Pellatt* (a), *Wymer v. Kemble* (b). The sheriff ought to have ascertained when the act of bankruptcy was committed, so as to see whether the assignees or the execution creditor was entitled to the proceeds of the sale.

*J. Bayley*, for the sheriff.—The sheriff has done all that this act of parliament requires. It only requires, that as soon as this claim is made the sheriff should apply to the Court. Here the first notice of claim was on the 17th of *March*; on the 15th of *April* the sheriff was ruled to return the writ, and the next day, which was the second day of the term, this rule was moved for.—[*Williams, J.*—No objection is made to the time when the application was made. Does it appear at what time the sale of the goods took place?]  
 —No, it does not; but the time when the sale took place is not, in all cases, the material fact on which the validity of the execution turns. It is submitted, that in this case the time of the sale is not material. The assignees, at any rate, cannot now claim the value of the goods, but only the amount received by the sheriff; as their notice of claim was for the monies levied by the sheriff by virtue of the execution.

*WILLIAMS, J.*—I confess this does not seem to me to be a case in which the Court can interfere in order to protect the sheriff, as, on his own affidavit, it does not appear he has used due and ordinary diligence. How does the case on his own affidavit stand? On the 19th of *January*, it appears the writ of *fi. fa.* was issued, and delivered to the sheriff for execution. So far so good: but the affidavit discloses no fact to show why the sheriff did not carry the writ into effect, and make the levy directly. Now, the next date we come to is the 17th of *March*, when the sheriff received the notice of the fiat having issued. Suppose it had so issued; if the sheriff had levied and sold the goods, and paid over the money within a week or a fortnight, the act of bankruptcy would have been immaterial, and the assignees could not have touched the sheriff. Therefore, if by not making a levy at all, when he might have done so, or by making the levy and keeping the money in his hands, he is placed in a difficulty which is caused entirely by his own delay. One of the cases which has arisen (c) has decided, that a delay of eleven days is too great to entitle the sheriff to relief under the act; and, on the authority of that case, I felt bound to decide a case that came before me in this Court (d). Those cases show the sheriff must be prompt in his application. In this case, it is not a question as to the time of the sheriff's application to the Court, but the time that the sheriff has taken to make the levy. No explanation for the delay has been given, and the sheriff would have been in no difficulty had he made a prompt sale. The rule must therefore be discharged: but I shall make no order as to the costs.

Rule discharged without costs.

(a) 8 Barn. & Cress. 722; 2 Man. & Ryl. 411.

(b) 6 Barn. & Cress. 479; 9 Dowl. & Ryl. 511.

(c) *Cook v. Allen*, 2 Dowl. P. C. 11; 1 Crompt. & Mees. 542; 3 Tyr. 586.

(d) *Ridgway v. Fisher*, 1 Har. & Wol. 189; 3 Dowl. P. C. 567.

Bail Court.

## SMITH v. HEAP.

**THIS** was a rule to show cause why the bail-bond should not be delivered up to be cancelled, on a common appearance being entered. The affidavit of debt stated the debt to be due for the agistment of cattle, but omitted to state they were agisted "at the request of the defendant."

An affidavit of debt for the agistment of cattle, must state it to have been "at the request of the defendant."

*G. T. White*, showed cause.—The rule *H. T. 2 W. 4, s. 8 (a)*, does not apply to this case, as it only directs, that affidavits to hold to bail for money paid, or for work and labour done, must state it to have been "at the request of the defendant." That rule, moreover, arises out of the difference in practice which previously existed in the Courts of *King's Bench* and *Common Pleas*. In the Court of *King's Bench* it was held, that an affidavit was not sufficient which omitted the words "at the request of the defendant;" *Durnford v. Messiter (b)*, *Pitt v. New (c)*; but in the Court of *Common Pleas* the contrary rule was observed; *Eyre v. Hutton (d)*, *Bliss v. Atkins (e)*, *Berry v. Fernandes (f)*. The rule, therefore, does not affect the practice of this Court.

*Humfrey, contra*.—The cases mentioned in the rule are only put by way of example, and it is not intended that the rule should be confined to those cases only. In the case of *Witham v. Gompertz (g)*, Lord Abinger approved of an affidavit as in accordance with the form given in *Tidd's Practice*. On referring to that book it will be seen, that the form given for the agistment of cattle contains the words "at his request." This rule must, therefore, be made absolute.

**WILLIAMS, J.**—As to the form of this affidavit I must give effect to the rule of Court, *H. T. 2 W. 4, s. 8*; although this is not one of the cases specified in the rule, as I cannot distinguish the case of the agistment of cattle from that of work and labour. As work and labour may be done without the request of the party sought to be made liable for it, so cattle may be agisted without a party's request. It appears to me, that the statement of the request to do the thing which is the foundation of the debt, is necessary. I observe that the form given in *Tidd*, for the affidavit in this case is in that form, and I have no compassion for parties who choose to disregard the forms given.

Rule absolute.

(a) 1 Dowl. P. C. 183.

(b) 5 Maule &amp; Sel. 446.

(c) 8 Barn. &amp; Cress. 654; 3 Mann. &amp; Ry. 129.

(d) 5 Taunt. 704, and 1 Marsh. 315.

(e) 5 Taunt. 766.

(f) 1 Bing. 338; 8 Moore, 332. See also *Reeves v. Hucker*, 2 Crompt. & Jerv. 44; 2 Tyr. 161; and *Marshall v. Davison*, 2 Tyr. 315.

(g) 1 Gale, 301; 4 Dowl. P. C. 382; 2 Crompt. Mees. &amp; Ros. 736.

*Bail Court.*

## WARD v. TURNER.

After a peremptory undertaking to try at a particular time, if the cause is made a *remanet*, on account of the sudden illness of a judge, and the plaintiff does not apply for the enlargement of his peremptory undertaking, the defendant is entitled to judgment as in case of a nonsuit.

**THIS** was a rule to show cause why a rule for judgment as in case of a nonsuit, after a peremptory undertaking to try at the last Summer Assizes, should not be set aside. The plaintiff not having proceeded to trial at the Spring Assizes, 1835, a rule was obtained in *Trinity* Term to show cause why the defendant should not have judgment as in case of a nonsuit. On showing cause the rule was discharged, on the plaintiff giving a peremptory undertaking to try at the following Summer Assizes. The plaintiff took his cause down for trial according to his undertaking, but owing to the sudden illness of Mr. Justice *Vaughan*, the cause was made a *remanet*. The plaintiff did not apply for an enlargement of his peremptory undertaking, and at the last Spring Assizes he withdrew the record. In this term the defendant had a rule for judgment as in case of a nonsuit, drawn up on reading the rule made in *Trinity* Term last. This was a rule to show cause why that rule for judgment as in case of a nonsuit should not be set aside.

*Whitehurst*, showed cause.—The first rule for judgment as in case of a nonsuit having been discharged on a peremptory undertaking to try the cause at the last Summer Assizes, the plaintiff was bound at all events to try the cause then. It is no excuse that he was prevented performing his undertaking by an event over which he had no control. Had the plaintiff made application in *Michaelmas* Term to enlarge his peremptory undertaking, the Court might perhaps have listened to him; but he did not do so either then or in *Hilary* Term, and at the subsequent assizes withdrew the record. The case of *Gilbert v. Kirkland* (a), where it was held, that the defendant could not have judgment as in case of a nonsuit, when a cause has been made a *remanet*, does not apply to this case, as in that case there was no peremptory undertaking to try the cause at a particular time. The defendant is also entitled to judgment as in case of a nonsuit, as the plaintiff, by withdrawing the record at the last Spring Assizes, has made a second default. The case of *Dyke v. Edwards* (b), though not exactly like the present, is an authority to show that this defendant is entitled to the rule for judgment as in case of a nonsuit, as for a second default.

*G. T. White, contra*.—The case of *Gilbert v. Kirkland* is an express authority to show, that where a cause has been made a *remanet* the defendant is not entitled to judgment as in case of a nonsuit. It is true that in that case there had not been a peremptory undertaking given to try the cause, but what difference can that make?—[*Coleridge, J.*—There is this difference, that here the plaintiff was in default before he gave the peremptory undertaking, and he only got leave to be allowed to try the cause on a certain condition, which he has not performed.]—The unforeseen illness of the judge, which is a circumstance over which the plaintiff had no possible control, was sufficient excuse for the plaintiff not performing his undertaking. This is not like the case of a bond conditioned to perform a certain act.

(a) 2 Dowl. P. C. 153.

(b) 2 Dowl. P. C. 53.

The rule of *Trinity* Term last was discharged in this form,—“Upon the undertaking of the plaintiff to bring on the cause *to be tried* at the next assizes,”—so that the plaintiff in fact has performed his undertaking, as it is clear on the affidavits that he was ready to try at the Summer Assizes. The rule for judgment as in case of a nonsuit obtained this time, having been obtained “on reading the rule made in *Trinity* Term last,” the defendant cannot now rely on any default made at the last assizes.

Bail Court.



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v.

TURNER.

COLERIDGE, J.—I think that when the facts of this case are examined, it will be seen that the case of *Gilbert v. Kirkland* has nothing to do with it. In order to see if it has, let us see the circumstances under which a rule for judgment as in case of a nonsuit may be obtained. That is a rule given by the statute 14 *Geo.* 2, c. 17, when the plaintiff neglects to carry his cause down for trial according to the practice of the Courts. Now, in an early case (a) it was held, that when once the plaintiff had taken the cause down for trial the defendant was not entitled to judgment as in case of a nonsuit for a second default, but must resort to his remedy by carrying the cause down by proviso. The case of *Gilbert v. Kirkland* decides no more than this, that where the plaintiff has once taken down his cause for trial, it does not signify whether he afterwards is passive and takes no step in the cause, or whether he gives notice of trial and abandons it; and that the defendant in neither case is entitled to move for judgment as in case of a nonsuit, on the ground that the plaintiff has once taken down the cause for trial, according to the course and practice of the Courts, and that therefore the statutable mode of proceeding is taken away. Here the plaintiff had failed to take the cause down for trial, and had been in default, and the defendant consequently had a right to his remedy under the statute, and had a rule *nisi* accordingly. That rule was discharged, not because it was improperly obtained, but on condition of the plaintiff undertaking to try the action at the next assizes; so that the facts of this case and those of *Gilbert v. Kirkland* are different. Then comes the question, whether there was any fault on the part of the plaintiff at the next assizes. In one sense there was none, as there was no moral fault, and no neglect on his part; but, in the sense of a condition, it was a peremptory undertaking to be responsible even though he had no control over the circumstances which prevented the trial. The plaintiff should have applied in *Michaelmas* Term to enlarge his peremptory undertaking, when that would have been done, no doubt, as the Court would have looked into all the facts of the case. The only use of the subsequent default is to see how far the plaintiff may be excused, and whether he is entitled to an extension of time; but, looking at the circumstances of the case, it goes to take away the right to any such an indulgence. I think, therefore, the case of *Gilbert v. Kirkland* does not apply, and that it was not an irregularity for the defendant to sign judgment as in case of a nonsuit, two terms after; and as the facts of the case at present appear before the Court, I do not see that the plaintiff is entitled to further time to try the cause.

Rule discharged.

(a) *King v. Pippett*, 1 Term Rep. 492.

Bail Court.



## HEDGES v. JORDAN.

If a plaintiff colludes with the defendant and settles the action, so as to deprive his attorney of his right to retain the sum recovered for costs due to him, the attorney cannot go on and compel the sheriff to return a writ of *ca. sa.*

THIS was a rule to show cause why a rule directed to the sheriff of *Wiltshire* to return a writ of *ca. sa.* should not be discharged, or why he should not have time given him to make his return. After the *ca. sa.* issued, the plaintiff, without the knowledge of her own attorney, made a compromise with the defendant, and accepted part of the debt due. After the compromise was made, the plaintiff wrote to the sheriff in the following terms:—"Hedges v. Jordan. I, the above named-plaintiff, have arranged and settled the action with the defendant, and I hereby require and caution you not to execute any warrant or other proceeding whatsoever against the above-named defendant in this action. *Sarah Hedges.*" The plaintiff's attorney, not having had his costs paid him, next wrote to the sheriff to say that the action was not settled, and that he would indemnify him if he proceeded to execute the writ on the defendant. The attorney then ruled the sheriff to return the *ca. sa.*, whereupon the sheriff obtained the present rule.

*Byles*, on the part of the plaintiff's attorney, showed cause.—This is a collusion between the plaintiff and the defendant's attorney, in order to deprive the plaintiff's attorney of his costs, as he would have been entitled to retain the whole of the sum recovered from the defendant for a debt due to him from the plaintiff herself. In the case of *Gould v. Davis* (a), the Court ordered a security taken by a party for his debt and costs, behind the back of his attorney, to be put into the hands of his attorney. That case is recognized in the subsequent case of *Young v. Redhead* (b). Those cases show that a settlement with the defendant, without the knowledge of the plaintiff's attorney, is not good. *Alchin v. Wells* (c) will be relied on by the other side; that case, however, does not apply, as it does not appear from the report but that that action was regularly settled between the attorneys. The Court will not countenance this unfair compromise.

*Barston, contrà.*—The cases of *Gould v. Davis*, and *Young v. Redhead*, would be applicable if other parties were before the Court, but do not apply in this case. Here it is the *sheriff* who seeks the interference of the Court to relieve him from the difficulty in which he is placed by the contention that has arisen between the plaintiff and her attorney. If the plaintiff's attorney has been defrauded, his remedy is by application to the Court, either against his own client, or against the defendant in the cause. It is not the sheriff who is to suffer for what he is no party to. The case of *Alchin v. Wells* is an undoubted authority to show, that if a compromise has been effected, neither party shall be allowed to rule the sheriff to return the writ. The case of *The King v. The Sheriff of London* (d), is also an authority for making this rule absolute.

WILLIAMS, J.—It does not appear in the report of the case of *Alchin v. Wells* in what manner the settlement was made, but there is nothing to show

(a) 1 Tyr. 382.  
(b) 2 Dowl. P. C. 119.

(c) 5 Term Rep. 470.  
(d) 1 Chit. 613.

that there was the intervention of any third party. The report states that the plaintiff and defendant compromised before the sheriff sold any of the defendant's goods. Now here the question is as to an underhand settlement made by the plaintiff with the opposite party independent of her attorney. It is certain, that if this were a matter between the party and his attorney, the Court would not countenance this collusion; but the sheriff has nothing to do with it, and he is not to be affected by the quarrels there may be between the attorney and his client. There was a formal notice by the plaintiff not to execute the *ca. sa.*, and if the sheriff afterwards executes it, it is at his own peril. I do not myself see how suing out a *ca. sa.* will assist the attorney to recover his costs; that, however, is a contingent speculation, with which the sheriff has nothing to do. Therefore, on the reason of the case, and on the authority of *Alchin v. Wells*, as far as that case is reported, this rule to discharge the rule to the sheriff to return the writ must be made absolute.

Bail Court.

HEDGES

v.

JORDAN.

Rule absolute.

## SMITH v. PRESTON.

**THIS** was a rule to show cause why the defendant should not be discharged under the Small Debts Act, 48 Geo. 3, c. 123. The action was trover for a barge; a verdict was returned for the plaintiff, damages 90*l.*, but Lord Denman, before whom the cause was tried, suggested that the damages should be entered for 40*s.*, and the barge be returned. Judgment was accordingly so entered, and the barge, after some delay, was returned. The defendant was afterwards taken in execution for the nominal damages and costs.

In trover for a barge, a verdict was given for the plaintiff with 90*l.* damages, which was reduced by consent to a nominal sum of 40*s.*, for which judgment was entered, and the barge was returned:—*Held*, that the defendant was entitled to be discharged under the Small Debts Act.

*Erle* showed cause in the first instance.—The act under which the defendant seeks to be discharged, is an act for the discharge of debtors in execution for small debts. Now although this defendant is only in execution for the 40*s.* nominal damages and the costs, yet the original debt being in fact 90*l.*, the verdict having been for that sum, he is not entitled to the relief he now seeks.

*Petersdorff, contra.*—The only question is, for what is the defendant in execution. The Act says, that all persons in execution for any debt or damages not exceeding 20*l.*, exclusive of costs, shall be entitled to the relief now sought for. This defendant being in execution for the 40*s.* only and the costs, is therefore entitled to have this rule made absolute.

**WILLIAMS, J.**—I must take the whole act together as explanatory of itself, though no doubt the title of it is "An Act for the discharge of debtors in execution for small debts." There is no doubt very great authority to show that in the construction of an act of parliament the title must not be neglected, but there is also no doubt but that both the title and preamble of an act may be exceeded by the act itself. When I come to look at this act, the word "debt," and the word "damages," both occur. The act itself, therefore, recognizes the 20*l.* as applicable to both debt and damages, and

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consequently shows what must be looked to, and makes it clear for what a party must have been detained a year in custody. In this case, therefore, I am to look to the amount for which the defendant was in custody; and whatever the case may have been originally, that amount at present is not larger than will entitle the defendant to be discharged.

Rule absolute.

KIRKE v. DARK.

The attestation to a cognovit given by a person in custody, must state expressly that the witness subscribes as attorney.

THIS was a rule to show cause why a cognovit should not be set aside. The defendant, when he signed it, was in custody under mesne process, and the attestation to his signature was "*Daniel Clutterbuck*, attorney for the above-named defendant." It was objected, that this attestation did not comply with the Rule of Court *H. T. 2 W. 4, 72 (a)*, as it did not state that the attorney subscribed as such attorney. Several other objections were averred, which it is unnecessary to notice.

Busby showed cause, and referred to *Bligh v. Brewer (b)*.

Barston, contrà.

COLERIDGE, J.—I shall dispose of this rule on the point of the attestation. I should be disposed, perhaps, to think the attestation was sufficient, unless I looked at the Rule of Court, which says that the "attorney shall subscribe his name as a witness to the due execution thereof, *and* declare himself to be attorney for the defendant, *and* state that he subscribes as such attorney." I must suppose that something must have been intended by this third condition of the rule, and as this attestation does not state that the witness did the act as the attorney of the defendant, I think the Rule of Court has not been complied with, and therefore this rule must be made absolute.

Rule absolute.

(a) 1 Dowl. P. C. 192.

(b) 1 Cr. Mees. & Rosc. 651.

GOLDING v. SCARBOROUGH.

It is no excuse for not making a motion to set aside a declaration for irregularity within four days, that the delay was owing to the defendant's attorney having been changed.

THIS was a rule to set aside a declaration for irregularity, the *capias* having been in an action on promises, and the declaration in debt.

W. H. Watson, on showing cause, took a preliminary objection, that the motion was made too late. The declaration was delivered on the 26th April, and the rule was not moved for until the 3d of May, whereas it ought to have been made within four days (c).

Richmond, contrà, said that the delay had occurred by the defendant having been obliged to have his attorney changed.

WILLIAMS, J.—The application was made too late.

Rule discharged.

(c) See the cases of *Hinton v. Stevens*, 1 Har. & Wol. 621; 4 Dowl. P. C. 283, and *Chubb v. Nicholson*, 1 Har. & Wol. 666.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term, 1836.

The KING v. The Churchwardens and Overseers of
WISTOW.

King's Bench.

UPON appeal made by *George Mingage*, the rector of the parish of *Wistow*, in the county of *Huntingdon*, against the poor rate of the said parish, wherein he was rated for his "corn rents, or composition for tithes," the Sessions quashed the rate, subject to the opinion of this Court on the following case:—Previous to the year 1880, the rector of the parish of *Wistow* was entitled, in right of his said rectory, to the tithes of corn, grain, hay, and all the other great and small tithes arising within that parish; but on the 3d day of *May* in that year, an Act of Parliament was passed for inclosing the said parish, and for extinguishing the tithes in the said parish, which is to be considered as forming part of this case. The 25th section of that Act is in the words following:—"The said Commissioner (meaning the Commissioner of Inclosure, by the act appointed) shall, and he is hereby required, within twelve months next after the passing of this act, to ascertain and distinguish the yearly value of all the tithes, and of all moduses, compositions, and other payments (if any) in lieu of tithes, which shall be arising, issuing, or renewing out of and from any of the said lands and grounds in the said parish of *Wistow*, hereby directed to be divided, allotted, and inclosed, and out of and from all and every the gardens, orchards, and other ancient and inclosed lands and ground, in the said parish of *Wistow*, and due and payable to the said rector, and in making such valuation, the tithes of

Where an Inclosure Act directs that a corn rent shall be awarded to the rector in lieu of tithes, and that, in making the valuation, "the tithes of all ancient and inclosed lands shall be taken as equal in value to one-fifth part of the net value of the said lands."—The rector was held to be rateable in respect of the corn rent so awarded to him.

Scamler, that when the legislature thus speaks of "the tithes" generally, and then of the "net value of the lands," as the equivalent for them, it must be presumed to mean that one-

fifth of the net annual value of the land is equal to the gross value of the tithes, and the rector is liable to be rated for the payment substituted, as he originally was for the tithes themselves.

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all such lands and grounds hereby directed to be divided, allotted, and inclosed, and of all the ancient and inclosed lands and grounds (except the inclosed fen lands and grounds) as shall be arable, shall be deemed equal in value to one-fifth part of the annual *net* value of the said lands and grounds, and the tithes of all such inclosed fen lands and grounds, shall be deemed equal in value to one-seventh part of the annual *net* value of such inclosed fen lands and grounds, and the tithes of all other lands and grounds in the said parish, shall be deemed equal in value to one-eighth part of the annual *net* value of all such other lands and grounds, after deducting the lands or grounds set out for roads, and the allotments hereinbefore directed to be set out for the purposes of getting stone, chalk, gravel, and other materials; and the said Commissioner shall, and he is hereby required, in the next place, by and from the *London Gazette*, or by such other ways and means as he shall think proper, to ascertain what has been the average price of a bushel (imperial measure) of good marketable wheat in the county of *Huntingdon*, for the period of seven years next before the passing of this act, and shall, in and by his award, or some previous writing under his hand to be annexed thereto, ascertain and distinctly set forth what quantity, and how many bushels of such wheat, will, in his judgment, be equal to the annual value of the said tithes; and after such valuation and ascertainments, the said Commissioner shall, and he is hereby required to determine what sum of money shall be equivalent to the value of the quantity of wheat so ascertained by him as aforesaid; and such sum of money shall be charged and appointed by the said Commissioner upon such lands and tenements of each and every proprietor, and in such manner as the said Commissioner shall think just and equitable; and such sum of money, when so apportioned and charged, shall be issuing out of the lands and tenements which shall be charged therewith by the said Commissioner, and shall be paid and payable by the person or persons who, for the time being, shall be in the occupation of such lands and tenements, to the said rector and his successors for ever (unless the same shall be altered by the ways and means hereinafter mentioned and provided), by four equal quarterly payments, (that is to say, on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th of *December*,) in each and every year; the first payment whereof shall be made on the 25th day of *March* next after the execution of the said award, or such earlier quarterly day of payment as the said Commissioner shall by such award, or by such previous writing under his hand as aforesaid direct or appoint; and the said rate hereinafter made payable shall be, and is hereby declared to be in lieu and full satisfaction and discharge of all and all manner of tithes, both great and small, moduses, compositions, and other payments in lieu thereof, arising, growing, issuing out of, and payable in respect of all the homesteads, gardens, orchards, open and common fields, meadows, pastures, commonable lands, and waste grounds, ancient inclosed lands and grounds, and all other lands, tenements, and hereditaments whatsoever in the said parish of *Wistow* (except *Easter* offerings, surplice fees, and mortuaries); and from and after the apportionment of the said rent, as hereinbefore provided, or at such other time as the said Commissioner, by any writing under his hand, shall fix and appoint, and all and all manner of tithes and former moduses, compositions, and other payments (if any), in lieu of tithes within the said parish of *Wistow*, shall cease,

determine, and be for ever extinguished; but, in the meantime the said rector and his successors respectively, shall be entitled to such tithes as he or they would have been entitled to if this act had not been passed." The Commissioner, under the authority of this section, by writing under his hand and seal, bearing date 3d of *October*, 1832, ascertained and set forth the quantity of wheat, in his judgment, equal to the annual value of the said tithes (the quantity being estimated according to the same section), and determined the sum of money equal to the quantity of such wheat, and thereby charged and apportioned such sum of money upon the lands and tenements of each and every proprietor, in the proportions set forth in the schedule to such writing. And the said Commissioner, by such writing, directed and appointed such quarterly payment of such sums of money or rent, to be made on the 25th day of *December* then next, and fixed and appointed that all and all manner of tithes, and all former moduses, compositions, and other payments (if any), in lieu of tithes, within the said parish, had ceased and determined, and were for ever extinguished, as and from the 29th day of *September* then last past. The Commissioner's general award was signed on the 17th day of *January*, 1833, the previous writing of the 3d day of *October*, 1832, being annexed thereto, and they are now both inrolled with the clerk of the peace in the county of *Huntingdon*, pursuant to the directions of the said Inclosure Act. The rector of the parish, the present appellant, has ever since been, and is now, in receipt of the amount of the said corn rent, in lieu of his former corn rents. The question for the opinion of the Court is, whether the rector was liable to be rated in respect of such corn rents? If the Court should be of opinion that he is rateable, then the judgment of the Court of Quarter Sessions is to be quashed, otherwise to be confirmed.

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The *Attorney-General* and Mr. *Gunning*, in support of the order of Sessions.—The rector is not liable to be rated in respect of these corn rents. Since the cases of *Lowndes v. Horne* (a), and *Rex v. Boldero* (b), it must be admitted that a corn rent, or other payment awarded to a rector in lieu of tithes, is in general rateable; but the corn rent is not rateable in this case, from the introduction of the word "net" into the act, which constitutes a statutable exemption. The tithes are to be calculated as equal to one-fifth of the annual net value of the ancient and inclosed lands, and so on of the rest. What is the meaning of this expression, "net value of the lands?" Why clearly this; that the corn rent allotted to the rector shall be equal to one-fifth of the annual value of these lands, after deducting (*inter alia*) the amount that they ought to pay for the poor-rates. A different holding would make the rector pay rates twice over; for the value would be ascertained, and the sum to be paid to him in lieu of the tithes declared, after making a deduction for the rates, and those rates would be called for from him upon a corn rent calculated upon this reduced valuation. It is the same here as if the act had directed that the sum to be paid to the rector, as a corn rent, should be "free and clear of all rates, taxes, and deductions whatsoever," or "free from all taxes and deductions whatsoever," in which case it is clear that the rector would not be rateable, *Chatfield v. Ruston* (c), and *Mitchell v. Fordham* (d). The expression, net annual value, must be

(a) 2 Sir W. Bl. 1252.

(b) 4 Barn. &amp; Cress. 467.

(c) 3 Barn. &amp; Cress. 863.

(d) 6 Barn. &amp; Cress. 274.

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interpreted here, as it would be with regard to land which was the subject of purchase and sale between two private individuals. It is clear that with them it would mean the value, after deducting all rates and charges. In *Rex v. Nockolds*, this very Act of Parliament came under the consideration of the Court upon another point, and Mr. Justice *Patteson* there intimated an opinion upon the point now in dispute, in favour of the rector. His lordship said (a) that the rector "wished to have it more clearly ascertained by the award, that the mode of valuing exempted his corn rent from the poor's-rate," and added, "I do not know that the result of the valuation may not be such in point of law." The mode of calculating the annual value must be taken according to the rule stated in *Rex v. Lower Mitton* (b), "The Sessions must rate the corn according to the annual profit or value which the subject of occupation within the parish produces. This in general would be properly estimated at the rent which a tenant would give, he paying the poor-rates, and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive." In *Rex v. The Hull Dock Company* (c), it was decided, that, in calculating the rateable value of the land, a deduction ought to have been made for the sum the company was liable to pay for the poor-rate. The value of the land here assigned to the rector, must be presumed to have been made upon such a calculation, and the present case is stronger than that, for here the word "net" has been used by the legislature, whereas there the terms used were simply, "worth and value."

*Sir W. Follett, contra*.—Where tithes are extinguished by an act of this kind, and corn rents are given in lieu of them, they are, unless expressly exempted, liable to be rated. The fallacy of the argument on the other side consists in this, that it assumes that the net annual value of the tithe has been taken, whereas the full value of the tithe has been taken, and the net value of the land allotted in lieu of it. To exempt that allotment from the payment of rates would, therefore, be most unjust. He was stopped by the Court.

Lord DENMAN, C. J.—It appears to me that the argument of *Sir Wm. Follett* is well founded. Although every thing may depend upon the word "net," as used in the Act of Parliament, it does not at all follow, because the net value of the lands is to be ascertained, that the corn rents are therefore to be taken to be of the net value of the tithes. I do not know that the act would have given so large a portion as one-fifth of the net annual value of the lands, if that was to be considered as free from deduction. That point may be open to argument, but I own it appears to me desirable to decide this on a broader ground, and one which will prevent all controversies on these minor points, and that is, on the ground on which the decision in *The King v. Boldero* proceeded—namely, that "where, under an Inclosure Act, a sum of money is given to the rector in lieu of tithes which were rateable, that money will also be rateable, unless the liability is taken away by express words in the statute. The money payment is liable to the same burdens as the tithes for which it was substituted." This gets rid of all

(a) 1 Ad. & Ell. 259.

(b) 9 Barn. & Cress. 819.

(c) 3 Barn. & Cress. 516.

difficulty, and all the authorities proceed upon this principle, and fully bear us out in coming to such a decision.

LITTLEDALE, J. concurred.

PATTESON, J.—The cases of *Mitchell v. Fordham*, and *Chatfield v. Ruston*, depended chiefly on the question whether “rates” and “taxes,” from which the corn rents were expressly exempted by the statute, included the poor-rate. On the present point this Court, in *The King v. Boldero*, decided that unless there is an express exemption by the Act of Parliament, corn rents given in lieu of tithes are rateable. That is a broad and intelligible ground of decision, and it is very desirable that we should adhere to it, and say that unless there is a clause of exemption, the thing given in lieu of tithes must be rated. But it is said, that there is here a clause of exemption, by reason of the introduction of the word “net.” On that point I must observe, that on reference to the statute, the word “net” will be found placed in conjunction with the annual value of the land—it is omitted in the part of the sentence which speaks of tithes. The legislature meant to say, that one-fifth of the net annual value of the land is equal to the gross value of the tithes. If the rector receives that gross value, he must be rated upon it. So he must on receiving what the legislature has deemed equivalent to it.

WILLIAMS, J.—This question arises on the arbitrary mode of ascertaining the value of tithes. Instead of ascertaining what the composition for the tithes is annually, the Commissioner is to ascertain what is the yearly value of the tithes, with regard to a certain proportion of the net annual value of the lands, and a certain portion of that net annual value is to be deemed the value of the tithes. Whatever deduction was to be made in ascertaining the value of the land, does not appear to me to affect the question, as to whether the rector is to have his corn rent free from the poor-rate, and unless there is something in the statute to show that it is to be exempt from rateability, there are so many decisions that the composition in lieu of tithes is rateable in the same manner as the tithes for which it is granted were originally rateable, that I think there can be no doubt that the rector in this case ought to have been rated.

Order of Sessions quashed.

### Ex parte HANDCOCK.

SIR W. FOLLETT moved that the applicant might be admitted as an attorney, without a term's notice. The applicant had served his time regularly, and some time after *Hilary* Term last he received an offer to be taken out to *Bombay* to practise there. He then took all the necessary steps for his admission to the Courts here. There was no opposition to his application. At that time it was supposed that he need not sail till *Trinity* Term, but the vessel in which he was going out was now unexpectedly ordered to go out immediately, and unless he could be admitted before the last day of

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WISTOW.

The Court will under particular circumstances, dispense with a term's notice in the case of the admission of an attorney.

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the present term, he must lose his passage. In *Ex parte Hulme* (a), an application similar to this had been granted. Notice of the application had been given to the Law Society.

*Per Curiam*.—Under the circumstances stated, the applicant may be admitted on the last day of this term.

Application granted.

(a) 1 Har. & Wol. 366; 4 Dowl. P. C. 88.

### REX v. GREAT and LITTLE USWORTH and NORTH BIDDICK.

Where a building contains under one roof three floors, each entered by a separate outer door, though one of the rooms on the middle floor cannot be entered but by going along or across a passage belonging to the upper floor, the occupier of such middle floor gains a settlement by renting under 6 Geo. 4, c. 57.

UPON an appeal against an order, by which *Caroline*, the wife of *William Waddell*, surgeon, who had deserted her and her seven children, were removed from the township of *Great and Little Usworth* and *North Biddick*, in the county of *Durham*, to the township of *Houghton-le-Spring*, in the same county, the Sessions quashed the order, subject to the opinion of this Court on the following case:—It was admitted at the trial of this appeal, that *William Waddell*, the husband and father of the paupers, had gained a settlement in the appelland township; and it was also admitted, that he had subsequently rented, paid the rent for, and occupied for a sufficient time, a tenement of sufficient value to confer a settlement in the township of *Painshaw*, in the said county, in the years 1829 and 1830, and the only question in dispute was, whether the tenement in *Painshaw* was or was not a separate and distinct dwelling-house or building within the meaning of 6 Geo. 4, c. 57. The tenement in question was part of an entire house, which consisted of three floors, viz. the ground floor, the middle floor, and the upper floor. The three floors were rented of the owner by three separate and distinct tenants. *William Waddell* rented and occupied the middle floor. The entrance to the ground floor was by a door in front, which was for the separate and exclusive use of the occupier of the ground-floor. There was no internal communication between that floor and any other part of the house. The entrance to the middle floor was by a flight of steps on the outside in front. The ground behind was elevated, so as to be on a level with the middle floor, and there was a back door behind entering into the middle floor. Both these entrances were for the separate and exclusive use of *Waddell*, the occupier of that floor. Another flight of outer steps in front led to a passage on the middle floor, which terminated in a staircase, and this flight of steps, passage, and staircase, formed the entrance to the upper floor. By means of internal communication, *Waddell* could pass from his front to his back door, and from one room to another, into all the rooms of his middle floor, except one very small room. *Waddell* had a locked door leading into the above-mentioned passage, immediately opposite the room in question, so that he could get to that room by merely crossing the passage which led to the upper floor, but he had the right of using the outer steps, and the whole of that passage, to enable him to get access to it, if he thought proper; but without using the passage in one or other of these ways, he could not get access to that room. One roof covered the whole of the three floors. The Sessions decided that *Waddell's* floor was a separate

and distinct dwelling-house within the meaning of the act. The question for the opinion of the Court was, whether the Sessions came to a right determination on that point.

*R. V. Richards*, in support of the order of Sessions, was stopped.

*Cresswell and Ingham, contra*.—This is not a separate and distinct building within the meaning of the statute. The cases of *Rex v. Rochester* (a), and *Rex v. St. Nicholas, Colchester* (b), though they do not decide the present, are important as guiding the Court to the principle on which its decision must proceed. The building must be a distinct and separate building. The mere fact that one apartment within the same building is separated from another, will not constitute an occupation sufficient to confer a settlement, otherwise the tenants of houses, who let out parts of them to lodgers, would come within the act, which it is clear they do not. In common parlance, the persons renting these different flats would be said to be renting different parts of the same building. Now the act requires that the renting shall be that of a distinct and separate building. The fact that an indictment for burglary might lie with respect to the rooms occupied by *Waddell*, does not decide the question here. *Waddell's* apartments might be sufficiently his for the purpose of maintaining such an indictment, and yet not sufficiently so for the purpose of his gaining a settlement. If the room occupied by *Waddell*, and thus separated from the rest, was necessary to make up the value of the other renting to the amount required by the statute, then it is clear that there has been no sufficient renting. To hold that each of these flats, all being under the same roof, is a separate and distinct dwelling-house within the meaning of the act, will be to give a construction to it subversive of the intention of the legislature.

LORD DENMAN, C. J.—I profess to follow the statute as closely as possible, and that I do so in saying that this is a distinct dwelling-house. I do not think it necessary to say more.

LITLEDALE, J.—I also am of opinion that this is a distinct dwelling-house. Each part of the building has a separate outer door. The only thing is, that in this dwelling-house there is one of the rooms which could not be got at by *Waddell*, but by opening a door which led over a passage belonging to another person, or by passing through that passage which had been built for the use of that other person who lived on the upper floor. That cannot, however, be considered as affecting the question, for the party had a right of way over or along that passage. The three outer doors here make the flats like those at *Edinburgh*, which are clearly distinct houses.

PATTERSON, J.—I thought that there had been some decision on the subject. The nearest is that of *Rex v. Wootton* (c), but that turns on the particular words of the statute, "actually occupied by the person hiring the same." The point there was, whether a man might gain a settlement by inhabiting one house of less than the required value, being also tenant of

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(a) 5 Barn. & Ad. 219.

(b) 1 Harr. & Woll. 47; 2 Ad. & Ell. 599.

(c) 1 Ad. & Ell. 232.

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another, also of less than the required value in the same parish, but which he had let to another person. *Rex v. Iver* (a) also bears upon the point. In that case the different members of the Court, in the course of the argument, expressed an opinion that separate and distinct meant separate and distinct from other persons,—that it meant holding the whole of the house. In the present case each floor is a house in itself.

WILLIAMS, J. concurred.

(a) 1 Ad. & Ell. 228; 3 Nev. & Man. 28.

### HILLS v. THOROWGOOD.

Where a drawer of a bill of exchange is one of the partners of a firm by which it is accepted, the notice which any one of the partners of that firm receives of its dishonour, is notice sufficient to bind the partner who is the drawer.

In such a case it is not necessary to prove that the partnership was in existence at the time the bill became due.

**A**SSUMPSIT, against the drawer of a bill of exchange for 35*l.* The bill was accepted by three persons then carrying on business as partners. The defendant was one of these partners. The defendant pleaded, first, that he did not make the note; secondly, that it was not duly presented; and thirdly, that he had not due notice of the presentment. At the trial of the cause before *Coleridge, J.* at the sittings in the present term, the learned judge told the jury, that as the drawer of the bill was one of the acceptors, the knowledge which the acceptors had of the non-payment of the bill, being the knowledge of three partners, of whom he was one, was sufficient to bind him as drawer, and that notice to one partner was notice to all. Verdict for the plaintiff.

*Hunfrey* now moved to set aside the verdict, and have a new trial, on the ground of misdirection.—*Porthouse v. Parker and others* (b), might appear to bear out the general proposition of the learned judge, but there the defence was not specially pleaded. Here it was specially pleaded, and the plaintiff had taken issue on it, and was therefore bound to reply the facts which made a notice unnecessary.—[*Patteson, J.*—There used to be an averment in all declarations on bills of exchange against the acceptor, before the new rules, that the defendant had notice, and that averment was always held to be proved by showing that the bill had been presented, and that the answer was, no effects. It never was requisite to state in the declaration, as an excuse for not proving notice, that the party had no effects.]

*Per Curiam.*

Rule refused.

*Hunfrey* then moved, on another ground, that there was no evidence given that the partnership was in existence at the time the bill became due. This objection was taken at the trial, but the learned judge ruled that the plaintiff need not show the partnership to be in existence, but that the defendant must show it to have been dissolved. This ruling was clearly erroneous, for the foundation of the first defence was, that the notice to one partner was a notice to all; and to support that defence, it was absolutely necessary to show, that at the time when the bill became due, the partnership was in existence.

(b) 1 Campb. 82.

Lord DENMAN, C. J.—How could the plaintiff show that? The dissolution of the partnership might be shown, but not the fact of its continued existence.

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PATTESON, J.—This bill was a partnership transaction. The dissolution might alter the rights of the partners towards each other on the bill, but still the bill would remain due from them all, notwithstanding the notice in the *Gazette*. The judgment of Mr. Justice Heath, in *Wood v. Braddick* (a), is express on this point.

*Per Curiam.*

Rule refused.

(s) 1 Taunt. 104.

### SABOURIN v. NEALE.

**TRESPASS** for taking divers goods and chattels of the plaintiff's by the defendant. The defendant pleaded that the alleged trespasses were done by him, by the authority of a certain Commission of Sewers for the *Tower Hamlets*, under the Great Seal of *Great Britain*, bearing date at *Westminster* the 4th *December*, 1830, directed to certain commissioners therein named, for a rate or tax assessed by the said commissioners, according to the tenor and effect of a certain act of parliament made in the 23d year of the reign of King *Henry* the 8th, entitled, "The Bill of Sewers, with a New Proviso." That such rate was duly made, and that he was appointed collector thereof, and so levied. Replication, *de injurid*. On this replication issue was joined. It was agreed, that the declaration and subsequent pleadings might be referred to as part of the case. The cause came on for trial at the *Middlesex* sittings in *Michaelmas* Term, 1834, before *Littledale*, J., when a verdict was found for the plaintiff for the amount of the sum paid by the plaintiff to recover the goods taken by the defendant, subject to the opinion of the Court on the following case:—One *Horace Watson* is the landlord of several small houses situate in *Thomas* and *Edward Streets*, *Bethnal Green*, in the jurisdiction of the said Commissioners of Sewers, which are occupied by different persons as his tenants. The plaintiff is the occupier of one of the houses in *Thomas Street*. Before the seizure of the goods in the declaration mentioned, certain persons were duly constituted Commissioners of Sewers by the Commissioners in the plea mentioned. The following documents were given in evidence by the defendant.

Where a collector for the Commissioners of Sewers receives from them a warrant directing him to distrain and afterwards sell the goods of A., he cannot, if he distrains the goods of A.'s tenant, justify the distress on the ground of his general authority of collector. Whatever that general authority may be, it is taken away in the particular case by the warrant directing him to do a specific thing.

1st. The Commission of Sewers for the limits above-mentioned.

2nd. Precept to summon Jury and return of Sheriff.

3rd. Presentment of Jury (the part material to the case, was as follows):—

"And we the Jurors aforesaid, upon our oaths aforesaid, do further present, that the several persons whose names are mentioned and contained in the several schedules to this our presentment annexed, are owners or occupiers of lands, tenements, hereditaments, and premises, within the several parishes of *St. Matthew*, *Bethnal Green*, &c., in the county of *Middlesex*; and that the lands, tenements, &c., held by the said persons respectively, are of the annual value as set against their respective names in the said several schedules. And we further present, that the said several persons whose names are so mentioned and contained in the said schedules, do receive benefit or avoid damage, by the support, maintenance, &c. of the public



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sewers within the said *Spitalfields* and *Wapping* level. And we do present the said schedules containing the names of owners or occupiers as aforesaid, being thirty-three in number, as part of this our presentment. In witness, &c." This presentment was dated 26th *August*, 1831, and as forming part of it, was a schedule, of which the following is an extract :—

"Parish of *St. Matthew, Bethnal Green*."

| Owners.       | Occupiers.          | Description of Premises.          | Rental.  | Owners.       | Occupiers. | Description of Premises.        | Rental. |
|---------------|---------------------|-----------------------------------|----------|---------------|------------|---------------------------------|---------|
| — Watson.     | .....               | Edward Street,<br>3 Houses at £10 | £.<br>30 | Isaac Watson. | ....       | Edw. St. West.<br>1 House at £9 | £.<br>9 |
| Isaac Watson. | .....               | Thomas Street,<br>2 Do. - 10      | 20       | Do.           | ....       | Court.<br>6 Do. - 8             | 48      |
| Hor. Watson.  | 3 at 10l. 1 at 12l. | 4 Do. 10—12                       | 42       | Do.           | ....       | Street.<br>2 Do. - 10           | 20      |
| Do.           | Richard Oliver.     | 1 Do. - 10                        | 10       | Hor. Watson.  | ....       | 1 Do. - 10                      | 10      |
| Do.           | .....               | 7 Do. - 10                        | 70       |               |            |                                 |         |

There was a regular notice of presentment, and the rate made thereon was in the following form :—

"Sewers, *Middlesex* } "A tax-rate or assessment made upon the several  
*Tower Hamlets.* } ral owners and occupiers of lands, tenements, hereditaments, and premises, in the several parishes of *St. Matthew, Bethnal Green*, &c. &c. in the county of *Middlesex*, being a pound-rate of 9d. in the pound by the year, charged upon the several lands, tenements, &c., now or late in the tenure or occupation of the several persons whose names are contained in the following pages of this book, according to the rents and profits of the same, at the annual rack-rental and value thereof respectively, pursuant to a decree of a Court of Sewers, holden for the said limits, on the 23rd *September*, 1831, for and towards the defraying the charges and expenses of the support, maintenance, &c. of the sewers of the said level; the works done, and to be done, in and upon and about the same; and the incidental expenses of the said commission, which said several persons following were, amongst others, presented by a jury, duly summoned and sworn at a Court of Sewers holden for the said limits on the 15th *July* in the said year, as receiving benefit or avoiding damage by the support, maintenance, &c. of the said sewers of the said level; which said tax-rate or assessment is as follows :—

"Parish of *St. Matthew, Bethnal Green*."

| Owners.       | Occupiers.          | Description of Premises. | Rental.  | Sum assessed.     | Collected. |
|---------------|---------------------|--------------------------|----------|-------------------|------------|
| — Watson.     | Edward Street.      | 3 Houses at £10          | £.<br>30 | £. s. d.<br>1 2 6 |            |
| Isaac Watson. | Thomas Street.      | 2 Do. - 10               | 20       | 0 15 0            |            |
| Hor. Watson.  | 3 at 10l. 1 at 12l. | 4 Do. 10—12              | 42       | 1 11 6            |            |
| Do.           | Richard Oliver.     | 1 Do. - 10               | 10       | 0 7 6             |            |
| Do.           | .....               | 7 Do. - 10               | 70       | 2 12 6            |            |
| Isaac Watson. | Edward St. West.    | 1 Do. - 9                | 9        | 0 6 9             |            |
| Do.           | Court.              | 6 Do. - 8                | 48       | 1 16 6            |            |
| Do.           | At 8l. ....         | 2 Do. - 10               | 20       | 0 15 0            |            |
| Hor. Watson.  | Street.             | 1 Do. - 10               | 10       | 0 7 6             |            |

The sums thus assessed amounted on the whole to 9*l.* 14*s.* 3*d.* It was proved by the defendant, at the trial, that *Horace Watson* had paid the water-rate for all the houses in question, and that the witnesses had never heard of the said *Isaac Watson*; but such evidence was objected to by the plaintiff, and the objection was reserved. The house of which *Richard Oliver* is stated to be the occupier, in the presentment and rate, is the house in which the distress was made. The appointment of the defendant was made by the Commissioners in the following terms:—"We do hereby authorize, depute, and assign you the above-named collector, to be gatherer of the tax-rate and assessment contained in the preceding pages of this book. And these are, therefore, in his Majesty's name, to authorize, depute, and assign you the said collector forthwith to ask, demand, receive, collect, and get in the several sums of money, of and from the several persons as they are added to their respective names, and are in the said rate contained, and to make payment thereof to the *Bank of England*, to the account of this Commission. And in case any person or persons shall neglect or refuse to pay his, her, or their proportion of the said rate, upon demand, then you the said collector are to summon such defaulters to appear at the Court of Sewers, to show cause why they neglect and refuse to pay the same, to the end that such further proceedings may be had therein as to law doth appertain. In witness whereof &c. Dated this 7th of *October*, 1831." The summons to *Horace Watson*, to show cause why he should not pay, was in the following words:—

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"Sewers, *Middlesex*, *Tower Hamlets*,  
*Spitalfields* and *Wapping Levels*.

"To Mr. *Horace Watson*.

"By virtue and in pursuance, and for the enforcing of a certain ordinance and decree of Sewers, bearing date the 23rd *September*, 1831, and made under and by virtue of His Majesty's Commission of Sewers for the *Tower Hamlets*, under the Great Seal of *Great Britain*, bearing date at *Westminster* the 4th *December*, 1830, directed to certain Commissioners therein named; I being duly deputed and assigned on this behalf, do hereby summon you to be and appear before His Majesty's Justices and Commissioners of Sewers for the *Tower Hamlets*, or such of them as shall be then present and acting under and by virtue of the said Commission, on *Tuesday* the 25th *September*, 1832, at twelve o'clock at noon, at the office of Sewers, No. 15, *Great Alie Street*, *Goodman's Fields*, within the limits aforesaid, at a Court of Sewers then and there to be holden, to show cause why you neglect and refuse to pay the sum of 9*l.* 14*s.* 3*d.* duly rated and assessed upon you, in and by a certain presentment, inquisition, and assessment duly made by a Jury of Sewers on the 26th *August*, 1831; and ratified and confirmed by the said ordinance and decree in respect of certain lands, tenements, hereditaments, and premises belonging to and occupied by you, situate in the parish of *St. Matthew*, *Bethnal Green*, in the *Spitalfields* and *Wapping* level, within the limits aforesaid, for and towards the charges and expenses of the support, maintenance, reparation, reformation, and amendment of the sewers of the said level; the works done, and to be done, in, upon, and about the same, and the incidental expenses of the said Commission; and why the said Commissioners should not, in default of such payment, decree and ordain from you payment out of such lands, tenements, hereditaments, and premises, or

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make and issue a warrant of distress to levy the said sum on your goods and chattels, together with the expenses attendant thereon, or take such other proceedings against you as the said Commissioners shall, in their discretion, think fit, and pursuant to the said Commission, and the provisions of the statute in such case made and provided. If you do not attend, the said Commissioners will proceed against you as if you had appeared. Dated this 19th September, 1832.

" Please to bring this summons with you.

(Signed) " Thomas Neale, Collector."

A letter of the date of the 27th March, 1832, written by the said *Horace Watson*, was put in; and, after objection, admitted by the judge, subject to the objection. The plaintiff was distrained upon for 9*l.* 14*s.* 3*d.* on the 12th April, 1833, the same being the amount claimed in respect of all the houses assessed as the property of the said *Horace Watson*. The plaintiff then put in the warrant under which defendant seized the goods of the plaintiff, which recited, that "*Horace Watson* was duly rated and assessed in the sum of 9*l.* 14*s.* 3*d.* in respect of certain lands, tenements, &c. held by him, situate in the parish of *St. Matthew, Bethnal Green*, in the *Spitalfields* and *Wapping* level, within the *Tower Hamlets*, for and towards the charges and expenses of the support, maintainance, &c. of the sewers of the said level; the works done, and to be done, in, upon, and about the same, and the incidental expenses of the said Commission; and that it appeared, upon the oath of *Thomas Neale*, collector of the said rate and assessment for the said level, that demand hath been made for the said sum of the said *Horace Watson*, but that the said *Horace Watson* hath neglected and refused to pay the same, and that the same still remains due and unpaid. And whereas it hath been duly proved to us, that the said *Horace Watson* hath been duly summoned to show cause why he hath neglected and refused to pay the said sum, and why, in default of such payment, he should not be proceeded against according to law; but the said *Horace Watson* hath not appeared in pursuance of such summons, and hath not shown any good and sufficient cause why the said sum should not be paid. These are, therefore, in His Majesty's name, to will and require you forthwith to make distress for the said sum of 9*l.* 14*s.* 3*d.* of the goods and chattels of the said *Horace Watson*; and if within the space of five days next after the making of the said distress, the said sum of 9*l.* 14*s.* 3*d.*, together with the reasonable costs and charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distressed, and levy the said sum of 9*l.* 14*s.* 3*d.*, and the reasonable costs and charges of keeping the said distress and sale thereof, &c., and that you restore the overplus, &c. to the said *Horace Watson* upon demand; and if no such distress can be had and taken, then you, the said *Thomas Neale*, are hereby required to certify the same to us, to the end that such further proceedings may be had therein as to law doth appertain. Given, &c. this 12th February, 1833." This warrant was duly signed and sealed by the Commissioners therein named. A notice of the distress was also put in. Several questions were intended to be raised on this case, but as the judgment of the Court was confined to the single point, that the documents set out in the case showed a special

authority to have been conferred on the collector, which special authority, it was admitted, he had exceeded, unless he could justify under his general authority as collector: the report of the arguments has been confined to that point.

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*Kelly*, for the plaintiff.—Even if it is assumed, that the collector might, on the authority of *Callis on Sewers* (a), upon his general authority as collector, distrain without a warrant, (which is positively denied,) it is clear that he cannot justify, on that general authority, when he has received a warrant. His general authority as collector is then restrained by the specific terms of the warrant. Here he had a warrant, which directed him to distrain upon the goods of Mr. *Horace Watson*, and to sell the same in default of payment. He has not obeyed either of these directions. The defendant cannot here justify what he has done under the issue taken upon the replication, for that replication only puts the defendant upon the proof of his plea; and the justification in the plea is under the special authority given him by the Commissioners, which authority he has not followed.

Sir *W. Follett*, for the defendant.—It is clear that a collector of sewers-rate may distrain by virtue of his general authority. The passage already cited from *Callis on Sewers* proves that position. In another place the same doctrine is supported. In speaking of the sale of goods seized, Mr. *Callis* takes a distinction between distraining and selling goods, and says, “the bailiffs who distrain cannot *ex officio*, without a special warrant first directed to them for that purpose from the Commissioners, make sale of goods distrained (b).” The restriction here said to exist, as to the power of the collector to sell without a warrant, shows, that at that time it was considered clear law that he might distrain without such an authority. If, at the time of the distress, there was a good right to distrain at all, that is sufficient. It is clear, that, at all events, the defendant might distrain the plaintiff's goods for so much of the rate as was assessed upon the house inhabited by the plaintiff. The verdict, therefore, must be entered for the defendant, for he was justified in distraining for 7s. 6d.; and the question raised on this record is not as to the amount of the distress, but as to the right to distrain. If he is justified as to the distress for the 7s. 6d., he is justified as to the whole; for, having entered upon a good title, he may justify all he has done as done under it; *Lucas v. Nockells* (c).—[*Patteson*, J.—How did you prove your plea?—By showing the appointment of the collector.—[*Patteson*, J.—That is, by showing an appointment of him to collect this particular rate, and limiting his authority as to the rate, and the person from whom it was to be taken. It cannot be said, that the Commissioners cannot prevent the collector from distraining upon any particular individual. Have they not done so here?—No: they have in the ordinary way directed the collector to levy on the person assessed, but that is an enabling not a restraining direction; and the collector's general authority will enable him to distrain, though it may not to sell the goods of a stranger on the land assessed; *Callis*, 185—192. This rate is a charge on land, *Rex v. Adams* (d); and, being so, any goods found

(a) Page 180, of the old edition; 214, of the 8vo. edition.

(b) *Callis on Sewers*, 192.

(c) 1 Clark & Fennelly, 438.

(d) 4 Barn. & Adol. 61.

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on the land may be distrained to satisfy it, under the general authority of the person appointed to collect the rate.

*Kelly*, in reply.—The judgment of the Court must be for the plaintiff. The distress is altogether illegal. No part of it can be supported. Whatever may be the general power of the collector, it is clear, that in this instance he derives all his power from two documents, which are now before the Court. It is impossible to say that they gave him any authority to distrain the goods of the plaintiff. The case of *Lucas v. Nockell*, therefore, does not in the least degree apply to this case.

Lord DENMAN, C. J.—The facts before us might have raised some important questions for the future government of the Commissioners of Sewers, and of persons liable to pay rates. On the one hand, it is desirable that the Commissioners should not be defeated in their duty, and prevented from recovering rates which are properly due; while, on the other, it is equally desirable that individuals should not be charged much beyond what they are legally liable to pay. But this case is stated in such a way as not to raise a point of any consequence at all, except so far as to prevent persons from justifying under circumstances which give the appearance of a justification, but which in reality afford none at all. It is found that the plaintiff was distrained upon for the sum of 9*l.* 14*s.* 3*d.* due from Mr. *Horace Watson*, and a warrant was issued to levy that sum. That is under the statute of *Anne*, under which the warrant could not be issued to authorize a seizure of the goods of the plaintiff, but of those of Mr. *H. Watson*. The first question then is, did this defendant receive that warrant from the Commissioners? It appears that he did; and that they appointed him the collector, and used large and extensive terms in giving him his authority; in which it is said must be included the power to distrain upon the premises. But I am not aware that the appointment of a collector by Commissioners of Sewers, does necessarily include the power of distraining goods for payment of the sewers-rate. It would require stronger authority than the opinion of any text writer, that he has any such general power. The authority given him here by the Commissioners is to receive from each person the sum of money set against that person's name. But whatever authority he might have to levy on *Watson*, he has none to levy on a person who does not fall within the description of those declared liable to the payment of these rates. His general authority, whatever it may be, is here expressly limited by the terms of his warrant. This is the short answer to the argument derived from his general character of collector, and to me it appears decisive of the present case.

LITLEDAL, J.—In this case the plaintiff is entitled to judgment. The warrant is only an authority to take the goods of Mr. *Watson*. I do not say that the collector may not have such a warrant as would authorize him to take the goods of the plaintiff, but that such a warrant was not given in this case. What was done here as if under the warrant cannot be justified by it. But then it is said, that the character of the collector authorizes him to make the distress, though not to sell the goods. How is this authority proved? He is proved to be a collector, and to have a general authority with respect to demanding the sums in question—he is to summon persons to attend at

the next Court. *Watson* was summoned, but did not attend. Has the collector a right, by virtue of his office, to do more? The general authority of the defendant is disproved by the circumstance of the Commissioners giving him a special warrant to make a distress. But then it is said, that it must be taken that what he had done had been done under the general authority given him by the appointment of him by the Commissioners; but they have done nothing which compels us to consider him as vested with a general authority to distrain; for in fact they gave him a special authority, which itself did not enable him to do what he has done. Then it is said, that he may defend himself upon the principle of the rule as laid down in *Lucas v. Nockells*. I admit the full authority of what was decided in the House of Lords in that case—that you may seize under one authority, and justify under another. But the jury here found that the seizure was under and by virtue of the warrant. Though there might be an authority to seize, that finding does not show that the warrant which they found to be the instrument under which he seized, was such an authority.

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PATTESON, J.—It is said in this case, that a serious and important question was intended to be raised by the Commissioners of Sewers for the *Tower Hamlets*, and that this question was, whether a number of small houses, happening to be in the possession of one landlord, the Commissioners can rate the landlord, and distrain on any one of the tenants for a rate made on the whole of the property? and perhaps, also, the further question whether any officer of the Commissioners has a general power *virtute officii* to distrain? This is said to be their intention, and they set about effecting it in the most extraordinary way in which any person in this world ever did set about such a business. (His lordship here went through all the statements in the case, and all that had been done by the Commissioners.) They appoint a collector, and instead of giving him the authority which he might have under the statute of *Henry 8*, they direct him to collect money from the persons named in that particular rate. They give him a special authority alone. *Expressio unius est exclusio alterius*. If they choose only to give him an authority to receive and pay over, he can have no authority to distrain. What is the next thing? Mr. *Horace Watson* is summoned—he does not appear—then a warrant goes to the same person, to distrain his particular goods, and to sell them. That is under the statute of *Anne*, which only gives them power to issue such a distress against the persons whose names are placed in the rates. The collector has not any general authority except under that instrument which appointed him collector—that is, an authority only to demand and receive, and not to distrain. The special warrant of distress is to seize the goods of *Horace Watson*, and yet the collector takes those of the plaintiff. The justification is not in any way made out, and judgment must be for the plaintiff.

WILLIAMS, J., concurred.

Judgment for the plaintiff.

## The KING v. The Justices of OXFORDSHIRE.

1. The application by the overseers against the father of a bastard, must be at the next practicable Sessions after the child first becomes chargeable.

2. It is a question for the Justices what circumstances shall entitle the overseers to make the application at a subsequent Sessions.

3. In order to an application at a subsequent Sessions, it is not necessary to enter and respite at the first Sessions.

THIS was a rule to show cause why a *mandamus* should not issue to the Justices of *Oxfordshire*, commanding them to enter an application of the overseers of the parish of *Bletchington*, for an order<sup>1</sup> of filiation as of last *Michaelmas* Sessions, and to enter continuances to the next *Midsummer* Sessions. It appeared that the bastard child was born on the 14th of *June* last, and immediately became chargeable to the parish. No application was made at the *Midsummer* Sessions which were held on the 30th of *June*. The overseers gave the requisite notice to the person intended to be charged, and went to the *October* Sessions, but discovering that it would be necessary, under 4 & 5 *Will.* 4, c. 76, s. 72, to be provided with material corroborative evidence, and having prepared none, they made no application at that time to the Court. At the *Hilary* Sessions, 1836, application was made, when the Justices refused to hear the case, as the application was made too late. It was admitted that the writ of *mandamus* could not issue in the terms prayed for, and that the Court should mould the writ so as to give the overseers relief, if they were entitled to it. In *Easter Term* last,

*Chilton* showed cause.—This question turns on the construction of 4 & 5 *Will.* 4, c. 76, s. 72, and depends on whether that enactment makes it imperative on the overseers to apply, if at all, to the next Sessions after a bastard becomes chargeable. The meaning of the statute is, that the application shall be made at the next practicable Sessions after the bastard is born and becomes chargeable. The words of this statute are similar to those of 17 *Geo.* 2, c. 38, s. 4, and it has been held in the case of *The King v. The Justices of Worcester* (a), that the appeal given by that act must be to the next Sessions. By the 73d section, there is a provision that the costs of the maintenance shall not be allowed for above six months previous to the hearing of the application, and it will be contended that that section shows that the legislature did not intend to compel the overseers, by the 72d section, to apply at the next Sessions. The 73d section, however, relates to the hearing only of the application, and there are many circumstances which may delay that hearing; for instance, the illness of the mother of the child, the absence of witnesses, or the impossibility of finding the person charged. The clear intention of the legislature was to impose some restriction on these applications, and to compel the overseers to elect immediately whether they would proceed against the reputed father. That intention is further shown by the 73d section, which makes it imperative on the Court to order full costs to be paid to the person charged, in case no order is made.

*Lumley, contrà*.—This point has been already before the Court in the case of *The King v. The Justices of Carnarvonshire* (b), but was not then decided. The words of 4 & 5 *Will.* 4, c. 76, s. 72, are directory only, and not compulsory. The argument that the 73d section applies to those cases only where the hearing of the application has been delayed for more than six

(a) 5 *Maule & Sel.* 457.

(b) 1 *Har. & Wol.* 324; 5 *Nev. & Man.* 364.

months, cannot be supported, as that would tend to show that it is not necessary in *all* cases to make the application at the *next* Sessions, and therefore, to support the construction that the 72d section is directory only. The chargeability is, moreover, a continuing act, and is a renewing chargeability from day to day, like a continued trespass, and the overseers may therefore proceed against the father at any Sessions, whenever they think it right so to do; where, however, they thus delay the application, by the 73d section they are restricted from recovering more than six months expenses of maintenance. If the construction that section 72d is compulsory, is now held to be good, it will follow that in no case is any direction left to the Justices to hear the application at a subsequent Sessions, as the only provision given by the statute is by s. 73, in cases where there is not time to give the necessary fourteen days' notice. This would be a serious inconvenience when the party charged could not be found. So, again, it would follow, that if a bastard child became chargeable for however short a time, and that after the ceasing of that chargeability, a Sessions should be held, and then the bastard should again become permanently chargeable, the overseers could have no redress against the putative father.

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COLERIDGE, J., the first day of this Term, gave judgment. After reciting the facts of the case, he continued :—The question turns entirely upon the construction which the 72d section ought to receive; that enacts, that “when any child shall hereafter be born a bastard, and shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the overseers or guardians of such parish, &c. may, if they think proper, after diligent inquiry as to the father of such child, apply to the next General Quarter Sessions of the Peace, within the jurisdiction of which such parish shall be situate, after such child shall have become chargeable, for an order, &c.” I have no doubt that in construing the words “next sessions,” I ought to apply the decisions upon similar words in former statutes, which give appeals against orders of removal and poor rates; and to hold them to mean the next sessions previous to which the requisite notice can be given, and at which; reference being had to all the circumstances, it is reasonable to expect that the parties should be prepared to go to the hearing of the application. I think it is fitting to lay it down as a rule, that the statute does not require the applicants to undergo the unnecessary expense of entering and respiting at a sessions, at which it is impossible that the parties should be prepared to substantiate the case; a circumstance, it should be observed, which may fairly be expected to occur with regard to nearly one-third of all the applications arising between any two given sessions. So far is clear, but a question then occurs, to what event or events the word “next” has properly relation? Three are previously mentioned, the two former, “the birth of the child and the chargeableness of the mother,” are considerations precedent to the application; the last, “diligent inquiry by the overseers as to the father,” may, perhaps, be directory only.

In the present case it was admitted that the chargeableness had commenced with the birth, and that sufficient inquiry as to the putative father had been made in time to bring on the hearing at the *October* Sessions. It would seem, therefore, that in any view but one, the application at the



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*Hilary Sessions* was too late. But it was contended, that the fact of chargeableness was in its nature renewing from day to day; that as the continuance of a trespass was a new trespass, so a continued chargeableness was a new one every day, and that the parish officers were not bound to apply upon the commencement, for that the statute might well be construed as leaving them a discretion to relieve the mother and child, which might be prudently exercised if the charge were likely to be of a temporary nature, and the right might yet remain to have recourse to the father at any point of its duration. In support of this it was observed, that the 73d section, which directs the costs of the maintenance to be calculated from the birth of the child, except where the application should be *heard* more than six months after that event, and then limiting it to the preceding six months, seemed to show that the legislature had contemplated the hearing as likely to take place, in many instances, more than two sessions after the birth of the child. This provision, however, applies to the *hearing*, which may be postponed for many reasons, and has little bearing on the present question.

Upon consideration of the general policy of that part of the statute which relates to this subject, I am of opinion that the argument cannot be sustained. It is clear that the legislature intended to impose *some* limitation of time on these applications, but this mode of construing the clause would in effect take away all limitation. It is clear also that the legislature intended to throw restraints upon the recourse formerly had to the putative father, and to give him a protection which he had not before: but to hold that the application may, at the discretion of the parish officers, be made at any time during the seven years following the birth, is to introduce a circumstance not merely unfavourable, but unjust to the party charged, as in proportion to the distance of time must be the difficulty of establishing that very species of defence which must in such cases be often necessarily relied on; while on the contrary, there is no injustice in requiring them to elect, when the chargeableness commences, whether they will have recourse to the putative father or not.

As a general rule, therefore, I am of opinion, that the application must be made at the next practicable sessions after the occurrence of the child's birth, and the mother's chargeableness in respect of it; still, however, leaving room for the exercise of a discretion by the justices in each case of an application made later, where it should appear that the delay had been occasioned by an ignorance of the father, or inability to procure evidence against him. This discretion would be regulated by a consideration of all the circumstances, and mainly whether due diligence had been used. It would be liable also in its exercise to the supervision of this Court. Applying these principles to the present case, no sufficient reason appears to excuse the delay that has occurred, for an ignorance of the plain provision of the statute is not such a reason. The justices have, therefore, in my opinion, exercised their discretion soundly, and this rule must be discharged, but, under the circumstances, without costs.

Rule discharged without costs (a).

(a) See the case of *The King v. Heath*, *post*, 143; and 6 Nev. & Man. 345.

## BARKER v. GLEADOW.

**T**HIS was an action for goods sold, and an order for time to plead had been obtained on the usual terms of pleading issuably. The defendant pleaded, that on the proposal of the plaintiff, who was to have a share in the profits, the goods were consigned abroad, and were not to be paid for until they were sold, and the proceeds returned to this country, and that no account had yet been received of the sale. The plaintiff's replication took issue on several things, and had a wrong conclusion. The defendant demurred specially, assigning for cause of demurrer, duplicity and the wrong conclusion. The plaintiff then signed judgment as for want of a rejoinder, contending that the demurrer was contrary to the terms of pleading issuably. A rule having been obtained to show cause why this judgment should not be set aside for irregularity,

After the defendant has had time to plead on the terms of pleading issuably, he is not precluded from demurring specially to the replication.

*Crompton*, in *Easter Term*, showed cause.

*Martin*, *contra*.

*Cur. adv. vult.*

COLERIDGE, J. this term (*June 1st*), gave judgment.—This was an application to set aside an interlocutory judgment, which had been signed upon the ground that the plaintiff's replication had been specially demurred to by the defendant, after time to plead given upon the usual terms. Two points were made; first, whether a special demurrer, filed *bond fide and for good cause*, was an issuable plea within the meaning of the undertaking; and secondly, if it were not, whether that undertaking extended prospectively to all future stages of the pleadings in the cause, or was confined to the state in which the record was at the time of the undertaking being given. As the authorities on these points are not uniform, I have taken time to consider my judgment. For the discussion of this case, it may be enough to state as to the pleadings, that the replication is extremely informal, and, if allowed to stand, would place the defendant's case in a difficult and disadvantageous position; and that the demurrer does not appear to have been filed for the purposes of delay, but with the fair object of relieving the defendant from that position. Upon the first of the two points above stated, there are not wanting cases such as *Dewey v. Sopp* (a), and *Langford v. Waghorn* (b), in which the undertaking has been construed merely as a restraint from demurring unfairly for delay, and for formal defects entirely collateral to the merits of the cause. Thus in the last case, where to a plea of title in trespass *quare clausum fregit*, the plaintiff had replied generally *de injuriâ*, and the defendant had demurred specially, the language of the Court is, "the demurrer was a *fair* demurrer, from which the plaintiff is not precluded by the terms of pleading issuably." These cases, however, are met by others, which lay down the rule in a more practicable and definite form, that no demurrer is an issuable plea if it cannot be sustained without assigning the causes specially. This is expressly

(a) 2 Stra. 1186.

(b) 7 Price, 670.

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stated in *Bell v. Da Costa* (a), and is the principle of the decisions in *Blick v. Dymoke* (b), *Newnham v. Dowding* (c), and *Sawtell v. Gillard* (d). In *Nanney v. Kenrick* (e), Bayley, B. says, "that a special demurrer is not an issuable plea, but that, if there are good grounds, the Court will sometimes strike out the causes." That is to say, if the demurrer can be sustained without the assignment, the Court will sometimes strike that out and allow the demurrer to stand as general, which practice seems to be a strong confirmative of his general position, that a special demurrer in form is not an issuable plea. This appears to me at once the most convenient and reasonable rule to establish; because it admits of the most easy and certain application, and leaves no room for questioning, in every case, whether the demurrer is *bond fide*, and goes to the merits or not; because, upon a question of whether a particular demurrer be an issuable plea or not, those inquiries are irrelevant; and because it imposes nothing hard upon the defendant, who by the hypothesis has become unable to make the defence, on which he wishes to rely, in the time allowed by the practice of the Court; who, if he had intended to rely on any formal defects in the action, should, at all events, have done so within that time, because he must have been apprized of them, and the inconvenience, if any, which he sustained thereby, as soon as the declaration was delivered; who is therefore called upon to pay a price for an extension of time to put in a defence, which may fairly be presumed to be intended to be a substantial one, that price being in effect an agreement on his part to speed the cause to its conclusion, and to bring it to an issue on the substantial merits of law or fact, without regard to any formal inaccuracies in the plaintiff's statement.

I am of opinion, therefore, that if this be to be considered as a demurrer to the declaration, the judgment will have been rightly signed. But it remains to consider the second point, namely, whether the undertaking was limited to the state of the record at the time of its being given, or extended to every future step in the pleadings. The latter is assumed in the cases of *Dewey v. Sopp*, and *Bell v. Da Costa*, before cited, with nothing said expressly on this particular point; and it is decided in *Sawtell v. Gillard*, C. J. Abbott saying, "that the undertaking is not performed if the party by his pleading fails to bring the merits of the case, or some question of fact, or some question of law, arising upon the facts, in issue." The argument of counsel, however, did not bring this particular point, nor a prior and contrary decision in the *Common Pleas*, to the attention of the Court, which somewhat detracts from the authority of the case. On the other hand, in the case alluded to, that of *Betts v. Applegarth* (f), the attention of the Court of *Common Pleas* was distinctly drawn to the point, and they decided that "the order for time, under terms of pleading issuably, must apply to the existing state of the cause at the time it is issued, and does not extend to cover subsequent errors." I do not rely upon *Langford v. Waghorn*, because the decision proceeded on another ground; nor upon *Gisborne v. Wyatt* (g), in which, however, my brother Parke appears to have been of opinion, that it was not intended by the undertaking that the plaintiff should be allowed to reply double.

(a) 2 Bos. &amp; Pul. 446.

(b) 1 Bing. 379.

(c) 1 Chit. 111.

(d) 5 Dowl. &amp; Ryl. 620.

(e) 1 Dowl. P. C. 610.

(f) 4 Bing. 267.

(g) 3 Dowl. P. C. 505; 1 Gale, 35.

Upon this state of the authorities, it is necessary to make an election, and in a matter of practice we are allowed, and we ought to adopt that rule which upon the whole may appear the most convenient and equitable. It has been suggested to me by high authority, that the rule laid down in *Sawtell v. Gillard* is the most proper to be adopted, with this qualification, that the defendant should be at liberty, whenever the plaintiff's replication was informal, so as to embarrass him in his defence, to apply to the Court or a judge to relieve him from his undertaking, and to be allowed to demur specially. By this provision, it is said the plaintiff will be sufficiently kept in check and the defendant protected, while by the rule itself the great evil of delay by demurrers for form will be prevented. It is added, that it would be convenient, with the same object in view, if the power to demur specially could be brought under the control of the Court in all cases; and that we ought to avail ourselves of the opportunity to exercise that control over it in the numerous instances which the giving time to plead would thus afford.

I have considered this opinion with the attention it deserves, but the conclusion to which I have come is in favour of the rule laid down by the Court of *Common Pleas*. Considering the two rules without reference to the qualification suggested as to the former, the latter appears to me the more convenient, because it tends to preserve the regularity and correctness of special pleading,—an object of the highest concernment in the administration of the law; whereas the former has a direct tendency to encourage carelessness at least, if not unfairness in the plaintiff's pleading; informality in pleading being, perhaps, in the greatest number of instances, the result, not of ignorance or inadvertence, but of design to place the adversary's case in a disadvantageous position. It appears to me also more equitable, because if the undertaking be limited to the state of the record when it is made, the defendant knows the price he pays for the boon he asks, both whatever advantage he foregoes, and whatever disadvantage he incurs; let the amount of either or both, therefore, be ever so great, he cannot complain. But it never can be understood, that when he undertakes, in the words of Lord *Tenterden*, "to bring the merits of the case, or some question of fact, or some question of law arising upon the facts, in issue," he undertakes to do this under all the disadvantages, it may be, absolute impossibility, which an astute adversary, by subsequent informality of pleading, may cast upon him. It is well known that the time allowed for pleading is so short, that whenever the facts are at all complicated, or communication must be had with the country for information, or counsel consulted on the proper pleas to be adopted, some allowance being made, as there must in reason be made, for their various engagements, an application for extended time is of absolute necessity. It is made as a matter of course, it argues no default in the defendant, and implies no desire to procrastinate the decision of the suit. Is it then reasonable to intend, that in a case of such constant occurrence, the judges impose, as a usual term upon the party, an undertaking so understood? A speedy coming to the issue, and a retrenchment of merely formal and dilatory objections, are very important objects; but they would be purchased too dearly, if one party were at the same time allowed so to frame his pleadings as to prevent the real merits from being in issue, or to compel the other party to try them at a disadvantage. Nor does the qualification suggested, of an application

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to the Court for leave to demur, appear to me to remove these objections. It must be remembered, that another term imposed on the defendant is to rejoin gratis, *i. e.* within twenty-four hours,—a period too short in the majority of cases to determine upon and availably make such an application. It is probable, that from the very shortness of the time allowed for consideration, it would be made almost as a matter of course in every case of a replication informally pleaded; if made to the Court, it is attended with considerable expense, and may occasion much delay; if to a judge at chambers, it requires him to enter more into the merits of the pleadings, and often of the cause itself, upon affidavits, than is at all desirable. I would observe too, that the plaintiff has the less ground to complain that his replication, if informal, is liable to be demurred to, as it is become now more generally understood than formerly, that the mere statement of a number of facts, all forming one answer, does not fall within the definition of duplicity, and that whenever the plea consists of mere matters of excuse, in whatever form of action, the replication of *de injuriâ* generally, is allowable. I am therefore of opinion, upon the whole, that it is better to abide by the rule laid down in the *Common Pleas*, according to which the defendant was not by his undertaking precluded from demurring specially to the replication, and consequently this judgment must be set aside.

Rule absolute.

### PEPPER v. YEATMAN.

A charge for advising a client as to an execution on a judgment obtained against him, is not a taxable item in a bill of costs, so as to require a signed bill to be delivered before bringing an action.

THIS was an action by an attorney for his bill of costs. The trial took place before the under-sheriff for *Hampshire*. Previous to the action being commenced, the plaintiff had not delivered to the defendant a signed bill, according to the statute, 2 *Geo. 2*, c. 23, s. 23. A verdict was found for the plaintiff, the under-sheriff giving the defendant leave to move to enter a nonsuit, on the ground that the plaintiff's bill of costs contained items which were taxable, and that he had not delivered a signed bill previous to bringing the action. One of the items in the bill of costs was this—"Attending on you and your son several times, respecting an action at law, which you had tried at *Winchester* at the last assizes, and wherein a verdict was given against you; and advising you fully respecting a bill of sale, given by you to Captain *Moore*, of stock, &c.; and perusing such bill of sale, when it was determined to apply to Captain *Moore* to have the same put in force, 13s. 4d." Another item was—"Attending on you respecting the sheriff having previously levied a warrant against your property, at the suit of the plaintiff in the action against you, although the officer's deputy was not in actual possession, when Mr. *Baskett* levied under the bill of sale, and very fully advising you thereon, 13s. 4d."

*J. Manning* now moved for leave to enter a nonsuit accordingly.—It has been held in several cases, that it is not necessary that the business charged for should be business done in Court, in order to make the items taxable. It is sufficient that the business be done in respect of an action which is in

Court; *Watt v. Collins* (a), *Smith v. Taylor* (b), *Wardle v. Nicholson* (c). These items are clearly for business done in respect of a writ.

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COLERIDGE, J.—The first item in this case mentions that the action is concluded, and is respecting an application to a previous vendee of some goods, to induce him to put the bill of sale in force; that is not within the case of *Watts v. Collins*. My doubt is as to the second item, but I think, taking the whole together, it is not a charge in respect to any assistance in the suit, being in fact for the purpose of defeating the suit. My present opinion is, that neither of the items is taxable.

*Cur. adv. vult.*

COLERIDGE, J. (the next day, *May* 26th.)—I am of the same opinion as yesterday, that these are not taxable items. The first has nothing to do with any action at that time in existence, but is in respect of a previous bill of sale, and as to advising it being put into force. That is a matter with which the attorney in a cause has nothing to do. The second item shows that the plaintiff had issued execution, but the advice relates to the enforcing the bill of sale, and I cannot see that that has any thing to do with the action. Neither item, therefore, is taxable, and no rule can be granted.

Rule refused.

- (a) *Ry. & Moody*, 284; 2 *Car. & Payne*, 1 *Dowl. P. C.* 212.  
 71. (c) 1 *Nev. & Man.* 355.  
 (b) 5 *Moore & Payne*, 66; 7 *Bing.* 259;

### SOMERS v. MILLER.

IN an action by an indorsee against the maker of a promissory note, the defendant pleaded that no consideration was given for it. To this plea there was a demurrer, and the case was put down for argument, and stood the last in the special paper for *May* 27th. No demurrer books were delivered by the defendant, according to the rule *Hilary* Term, 4 *Will.* 4, s. 7 (d).

A defendant having neglected to deliver the demurrer books according to the rule of Court, the Court granted a rule nisi for judgment.

*J. Jervis*, on the 28th of *May*, moved for a rule for judgment.—The plea is clearly bad, according to two cases already decided (e), and owing to the arrear of business, it is unlikely that the demurrer should come on for argument this term. The defendant has not delivered the demurrer books, which he was bound to do four days before the day appointed for argument, and it is not sufficient if he delivers them four days before the day it is actually argued.

COLERIDGE, J.—You may take a rule for judgment, unless cause is shown, and serve that rule on the defendant.

Rule accordingly.

- (d) 2 *Dowl. P. C.* 305.  
 (e) *Trinder v. Smedley*, 1 *Har. & Wol.* 309, and *Graham v. Pitman*, *id.* note.

*Bail Court.*

## ROSCOE v. HARDMAN.

The Court will not grant a rule in the alternative, calling on an attorney to show cause why he should not deliver up certain papers before a certain day, and if not, why an attachment should not issue.

A RULE having been obtained in a previous term, calling on an attorney to show cause against it, the matter was referred to the Master. The Master had the parties before him, and having reason to think, on the hearing of the case, that the attorney had certain papers in his possession, directed that he should make further inquiries, and search for them. The attorney, on going again before the Master, refused to make any further affidavit about the papers. The Master then made his report, in which he stated that it appeared to him very probable that the attorney had possession of the papers.

*Hoggins* now applied for a rule to show cause why the attorney should not deliver up the papers mentioned in the Master's report before a certain day, and if not, why an attachment should not issue against him. The officer of the Court objected, that this was in fact applying for two rules, but it was submitted that, under the circumstances, the rule ought to be granted in the form prayed for.

COLERIDGE, J.—If you think you now have grounds on which to move for an attachment, you may move for one; or if you think you have only grounds at present for a preliminary motion, to show cause why he should not deliver up the papers, you may move in that form, but you cannot have the rule in this form.

*Hoggins* then took a rule calling on the attorney to show cause why he should not deliver up the briefs, pedigrees, papers, &c., mentioned in the Master's report, and why he should not pay the costs of the application.

## INLAND v. BUSHELL.

Goods having been seized and sold under an execution, and the proceeds paid over to the execution creditor, the sheriff cannot apply to the Court for relief under the Interpleader Act, though he had no notice of the claim until after the sale.

IN this case a *fiery facias* was sent by the attorney for the plaintiff, with a request that a special warrant should be directed to a particular person named. The special bailiff seized some goods, sold them, and paid the proceeds to the execution creditor. After the sale, and four days after the writ was delivered, the sheriff received notice of a claim to the goods, from the assignees of the defendant, under a fiat in bankruptcy. The sheriff, not knowing the sale had taken place, informed the plaintiff's attorney of the claim, and heard nothing more of the matter for six weeks, supposing the sale was not proceeded with. At the end of that time he was ruled to return the writ of *fi. fa.* by the defendant's assignees.

*Whitmore* moved for a rule under the Interpleader Act, 1 & 2 Will. 4, c. 58.—In the case of *Scott v. Lewis (a)*, the Court of *Exchequer* held that the money being paid over to the execution creditor, the sheriff was not

(a) 1 Gale, 204; 2 Crompt. Mees. & Ros. 289; 4 Dowl. P. C. 259.

entitled to relief under the act. This case differs in its circumstances, and the Court may think right to grant the rule.

Bail Court.



INLAND

v.

BUSHELL.

COLERIDGE, J.—I think this is not a case for the interference of the Court. There are no longer any contending claimants. The execution creditor is satisfied, and now another person threatens the sheriff with an action for what has been done. I fear he must stand the trial of that. Supposing a rule were granted, and the execution creditor was not to come in and show cause, he would then be barred, but of what? He has already received the proceeds of the sale.

Rule refused.

### JONES v. JEHU.

THE defendant in this cause was arrested for the sum of 79*l.* 18*s.*; the sum of 15*l.* was paid into Court. The cause came on for trial, and after it was partly heard, it was agreed to refer it to an arbitrator. A verdict was then taken for the plaintiff for 100*l.*, and the cause and all matters in difference were referred by the usual order of *nisi prius*; the costs of the cause to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator, after hearing the parties both as to the matters in the cause, and also as to another matter in difference, made his award, whereby he reduced the verdict to the sum of 25*l.* 10*s.* 6*d.*, over and above the 15*l.* paid into Court. He also awarded, that another action brought by the plaintiff against the defendant should cease, and that the plaintiff should pay the costs incurred by that action; and he further awarded, that the defendant should pay the plaintiff a sum of money on account of a claim for which no action had been brought. A rule having been obtained to show cause why the defendant should not be allowed his costs under the 43 *Geo.* 3, c. 46,

A verdict having been taken by consent for the plaintiff, and the cause and all matters in difference referred, the arbitrator awarded a less sum to the plaintiff than that for which he had arrested the defendant, and then awarded separately on the other matters referred:—*Held*, that the defendant was not precluded from having his costs under 43 *Geo.* 3, c. 46.

*J. Jervis* showed cause.—The defendant is not entitled to have this rule absolute; the case of *Keene v. Deeble* (a) is an authority against it. This case, it is true, differs from that, inasmuch as here a verdict has been taken, but still it is within the rule there laid down, as, besides the cause itself, all matters in difference were referred, and it is clear from the award that there were other matters in difference on which the arbitrator decided. The case of *Thompson v. Atkinson* (b), is precisely similar to the present. Lord *Tenterden* there says, “One matter in difference between the parties at the time of the submission, was, whether the defendant was or was not entitled to a compensation for the injury he had sustained in consequence of having been held to bail for 179*l.*, when a much less sum was due from him to the plaintiff.” So here it was also a matter in difference between the parties, and the defendant is not entitled to this rule.—He then contended, that on the merits, also, the rule ought not to be made absolute.

*Welsby, contra*.—The case of *Keene v. Deeble* is entirely distinguishable from the present, as in that case no verdict was taken. The case of *Thomp-*

(a) 3 *Barn. & Cress.* 491; 5 *Dowl. & Ryl.* 363.

(b) 6 *Barn. & Cress.* 193; 9 *Dowl. & Ryl.* 347.



Bail Court.

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JONES

v.

JERU.

son v. *Atkinson* is also distinguishable. There, the award stated a certain sum to be due on a balance of accounts. Here the arbitrator, by his award, has made a distinct adjudication as to the other matters in difference between the parties which were not included in the action referred. As to the sum awarded in that cause, therefore, the awards stand precisely in the situation of a verdict. The arbitrator in this case not having awarded any compensation to the defendant for the arrest, although, perhaps, he might have done so as a matter in difference between the parties, does not therefore prevent the defendant having this rule made absolute.—He also contended, that on the merits, the rule should be made absolute.

Cur. adv. vult.

COLERIDGE, J., afterwards (*June 7th*) gave judgment.—This was a motion for allowing the defendant his costs under the 43 *Geo. 3*, c. 46. The arrest had been for 79*l.* At the trial, the cause was referred, but a verdict was taken for 100*l.*, to be reduced according to the award. The cause and all matters were referred; the costs of the cause to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that the verdict should be reduced to 25*l.* 10*s.* 6*d.*, over and above 15*l.* already paid into Court. On showing cause, it was contended, upon the authority of *Keene v. Deeble* and *Thompson v. Atkinson*, that this was not a case within the statute. It is obvious, however, that there is a distinction in principle between those cases and the present, inasmuch as in *Keene v. Deeble* no verdict was taken, the money therefore could not be said, in the words of the statute, to have been *recovered*: and in the latter, the arbitrator had taken the arrest without reasonable cause, into his consideration, as a matter in difference between the parties, and awarded compensation in respect of it. There are, indeed, expressions to be found in the judgments in the former case, which might seem to apply even where a verdict had been taken; but none which extend to such a reference and such an award as this.

Here the arbitrator, in the first place, reduces the verdict, and disposes entirely of the action; he then adjudicates separately concerning a second action brought by the plaintiff against the defendant, deciding that there was no cause for bringing it, directing it to cease, and the plaintiff to pay the costs; and, lastly, he adjudicates on a third claim by the plaintiff on the defendant, for which no action had been brought, and directs the payment of a sum of money in respect of it to be made on a future day. The arbitrator, therefore, has kept the cause distinct from the other matters, and nothing is stated to show, that in the trial of the cause before him, any medium of proof was resorted to, not available at *nisi prius*. I cannot then discern any principle upon which the defendant's rights, under the statute, as to the cause thus distinctly tried and disposed of, can be affected by the circumstance, that other matters in difference are at the same time and in the same submission referred to, and adjudicated on by the same arbitrator. No such consequence appears to flow as a legal conclusion from such premises, nor can I see any ground for inferring any agreement on the defendant's part to waive such rights.

But upon the merits it was contended, that this rule should be discharged, and upon looking through the affidavits, I am of that opinion. It appears, that before the arbitrator, the plaintiff established every item in his particulars of demand, to an amount exceeding that for which the defendant was

held to bail. The reduction of the verdict was occasioned by the defendant's establishing a set-off to the amount of nearly 40*l*. But it appears to me, that the plaintiff neither did know, nor had reason to suspect the existence of any such demand. In the defendant's affidavit it is not stated, that before the arrest he had ever made any claim on account of it; in the plaintiff's affidavit it is positively denied that he ever had; and it is alleged that he had settled an account in which the items should have appeared, but did not; that, subsequently to this, he had on several occasions borrowed money of the plaintiff, and when pressed for payment, been wholly silent as to the present claim; and further circumstances are stated with respect to the transaction out of which the set-off grew, from which it is a reasonable inference that this claim was merely an after-thought.

I am, therefore, of opinion, that the plaintiff, when he arrested the defendant, had a reasonable and probable cause for holding him to bail for the full sum, and this rule must consequently be discharged.

Rule discharged.

DOE *d.* CHILDERS *v.* ROE.

MANSEL moved for judgment against the casual ejector.—The affidavit stated, that the premises had been let by indenture to a person who had underlet part to another. The part which was in the possession of the original lessee was shut up, and a blacksmith, in the neighbourhood, kept the key for the purpose of showing the premises, and letting them for the lessee. Many inquiries had been made for the lessee himself, who could not be met with, who was keeping out of the way, and was living out of the jurisdiction of the Court. The declaration and notice had been served on the blacksmith, but the affidavit did not state that it was "the tenant in possession" who had been served in that way. There had been service on the wife of the under-tenant on the part of the premises let to him.

Bail Court.

JONES
v.
JERU.

Rule nisi granted for judgment against the casual ejector, where the tenant in possession was keeping out of the way, and service had been made on a person who kept the key of the premises.
Service on an under-tenant of part of the premises, cannot be considered as service on a joint-tenant.

Mansel submitted, that as to the first tenant, he was entitled to a rule nisi at least; and also that the service on the under-tenant made the case come within the rule, that service on one of two joint-tenants was sufficient, so as to entitle him to a rule absolute.

COLERIDGE, J.—The affidavit will not do; it must state that the deponent served "the tenant in possession," by doing so and so. It must be in the right form. The under-tenant cannot be considered as a joint-tenant, he is under-tenant of part only. You may take a rule as to the part in his possession only.

Mansel, the next day, renewed his application, on an affidavit, stating the service on "the tenant in possession," by service on his agent, the blacksmith, and the Court granted a rule nisi for that part of the premises.

Bail Court.



The KING v. The Sheriff of HERTFORDSHIRE.

If a sheriff applies for relief under the Interpleader Act, and on hearing the case his rule is discharged, he has afterwards a reasonable time to make his return; and therefore an attachment obtained against him the same day for not making a return, is irregular.

ON the 19th of *January*, a *fi. fa.* issued on a judgment. On the 15th of *April*, the sheriff was ruled to return the writ, and on the 20th, which was *Easter Term* last, the sheriff obtained a rule *nisi*, under the Interpleader Act, 1 & 2 *Will.* 4, c. 58, which, on coming on to be heard on the 7th of *May*, was discharged (a). On the same day the plaintiff's attorney searched the office to see if the sheriff had made any return to the *fi. fa.*, and finding he had not, the same day obtained an attachment against him for not doing so (b). The 8th of *May* was a *Sunday*, and on the 9th, which was the last day of the term, the sheriff made a return of *nulla bona*. A rule to show cause why that attachment should not be set aside, having been obtained on the first day of this term,

C. Turner afterwards showed cause.—This attachment was regular. The sheriff ought to have made his return, notwithstanding the rule obtained under the Interpleader Act. He has no right to delay and take the chance of the decision of the Court under that act. It would be dangerous to give him the opportunity to shape his return according to that decision. Here the sheriff has returned *nulla bona*, which is inconsistent with his application under the Interpleader Act, when he allowed he had made a seizure. The consequence of this return is, that the execution creditor has to contend with the sheriff the truth of that return. The only ground on which this attachment can be discharged, is on the ground that the sheriff had the same time to make his return after the interpleader rule was discharged, that he had at first. The case of *St. Hanlaire v. Byam* (c), is an authority against that position. The case of *Green v. Glassbrook* (d), is an authority to show, that when a party chooses to elect to take the benefit of a statute, he must take it with all its consequences. The consequence of the sheriff applying in this case under the Interpleader Act, is, that on the rule being discharged, he is liable to an attachment. At the time the sheriff applied for this rule, he had already made his return, yet he concealed that fact from the Court, as well as what the nature of that return was. At any rate the attachment should only be set aside on payment of costs.

J. Bayley, contra, was stopped by the Court.

COLERIDGE, J.—I have no difficulty in this case, as it is quite clear, when the facts are looked at, that this rule must be made absolute. This rule has grown out of an application by the sheriff to the Court under the Interpleader Act. That application assumes that the sheriff has made no return, and now the ground on which this rule is resisted is, that the sheriff is bound to make a return while that application is pending. If he does so, it is inconsistent with his application. It is not to be expected he should do so, and if not, he must have a reasonable time to make his return after the application

(a) See the case *Lashmar v. Claringbold*, ante, 87.

(b) See the Rule, M. T. 32 Geo. 3; 4 Term Rep. 496.

(c) 4 Barn. & Cress. 970.

(d) 1 Hodges, 27; 1 Bing. N. C. 517; 1 Scott, 402.

is disposed of. If, then, he is allowed to do that, he cannot be bound to make his return the *same* day. That alone is sufficient cause to make this rule absolute, without reference to the cases that have been cited. Mr. *Turner* has relied on the return of *nulla bona*. I have disposed of the point of his making *some* return; then as to the particular nature of this return. The sheriff came to the Court for protection under the Interpleader Act, and he was refused that protection under the circumstances of the case, but that does not take away from him his right to decide for himself, and to return *nulla bona* or *levavi feci*. The return of *nulla bona* is not inconsistent with what he has said when applying to the Court, namely, that he has seized goods under the *fieri facies*, which were in the possession of the defendant. The sheriff has made no election, but has only endeavoured to get the protection of this Court. The rule must be absolute for setting aside the attachment, and without the condition of the payment of costs, as the attachment never ought to have issued.

Rule absolute.

Bail Court.

The King
v.
The Sheriff of
HERTFORD-
SHIRE.

LAWRENCE v. MATHEWS and others.

THE defendants were sued by the plaintiff as partners and adventurers in a mine. The first count of the declaration was in an action on the case, and stated an obstruction by the defendants in collecting the tolls and dues of a tin mine; the second count was a count in trover for the ore. The defendants had paid the dues in question to three different lords for some time past, and the plaintiff made a claim to part of the share of one, for which the action was brought. In last term, a rule was obtained under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 1, by the defendants, calling on *William Carlyon*, the lord to whom they had been accustomed to pay the share claimed, to appear and state the nature of his claim. The affidavit on which the rule was granted stated, that the defendants were sued as partners and adventurers in the mine, and that they had worked it since the year 1830; it also stated the different shares they had paid to the different lords, and some notices of claims made by the plaintiff to part of the tolls, and of the ore; it also stated that the defendants claimed no interest in the tolls or dues, but did not state that they claimed no interest in the ore.

In an action in case for an obstruction in collecting tolls of a mine, with a count in trover for the ore, against the adventurers who claimed an interest in the ore, but disclaimed as to the tolls:—*Held*, that the Court could not entertain an application by the defendants under the Interpleader Act.

W. C. Rowe, for the plaintiff, this term showed cause.—This is not a case within the act, 1 & 2 Will. 4, c. 58, s. 1, as it does not extend to an action on the case, the only forms of action are assumpsit, debt, detinue, and trover. It is also clear that the defendant has an interest in the ore; it is stated he is one of the adventurers, and has worked the mine, and the affidavit does not state he has no interest in the ore raised. He was then stopped by the Court.

Jardine, for the defendant.—If the Court does not grant this rule, it will be impossible for the defendant to have the benefit of the statute in an action of trover, as the plaintiff will always be at liberty to add a count in case. There is no case to be found analogous to the present, but it is sub-

Bail Court.

LAWRENCE

v.

MATHEWS.

mitted, that the Court, having jurisdiction over the count in trover, may dispose of the whole of the case under the act.

Montague Smith, for William Carlyon.

COLERIDGE, J.—How can I interfere unless I can dispose of the whole of the demand? The words of the act are, that upon application “in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the *subject-matter* of the suit, but that the *right thereto* is claimed, or supposed to belong to some third party,” &c. The affidavit on which the motion is made ought, therefore, to go to the whole matter of the suit. All that the defendants here say is, that they do not care to whom they pay the toll, but they do claim an interest in the ore, so that there is this difficulty, that as to the count in case, over which the Court has no power, they entirely disclaim all interest; but as to the count in trover, over which the Court has power, they do claim an interest. The rule must be discharged, but without costs, as it is a new point; and I cannot say it has been vexatiously brought here, though I have no doubt the rule cannot be sustained.

Rule discharged.

DOE *d.* ROSS *v.* ROE.

Rule granted to show cause why service of a declaration in ejectment on the clerk of an incorporated company, should not be good service.

CHANNEL moved for a rule to show cause why service of a declaration in ejectment on the clerk of the Grand Junction Canal Company, should not be good service. There is no provision in the act incorporating that Company enabling them to sue in the name of their clerk, or declaring that service of a declaration in ejectment on him should be good. The service was on the clerk on the Company's premises, but not on the premises sought to be recovered. *Doe v. Roe (a)*, is a case nearly in point.

COLERIDGE, J.—You may take a rule, *nisi*.

(a) 1 Dowl. P. C. 23.

The KING *v.* ROGERS and others.

Recognizances of bail taken under statute 5 & 6 W. & M. c. 11, on the removal of an indictment, cannot be estreated, the defendant having agreed with the prosecutor to plead guilty and submit to a nominal fine, without the knowledge of the bail.

THIS was a rule calling on *John Duckett* and *John Rogers*, the bail for one of the defendants, *Francis Rogers*, to show cause why the recognizances of bail entered into under the statute 5 & 6 W. & M. c. 11, on the indictment being removed by *certiorari* into this Court, should not be estreated, the defendant having been convicted of the offence charged. At the trial it was agreed that defendant should plead guilty to the indictment, and should submit to a nominal fine, but should not be brought up to be fined until the decision of a certain action of replevin. The judgment was accordingly entered up in that interlocutory sort of way in which it now stood. The bail were not parties to the agreement.

Bull showed cause, and contended that there was no final judgment, and that, therefore, the application was too soon. He cited *Rex v. Turner (a)*.

Bail Court.

 The KING
 v.
 ROGERS.

Whateley, contrd, contended that the judgment entered was sufficient to entitle him to this rule. He also contended, that the case of *The King v. Turner* did not apply.

COLERIDGE, J.—I understand the bail were not parties to the arrangement, therefore, without deciding the other point, I think on these facts the recognizances cannot be estreated. The defendant, without the privity of his bail, agreed to plead guilty, and to submit to a nominal fine: under those circumstances the recognizances cannot be estreated. The rule must also be discharged with costs, as these proceedings are premature, no final judgment being entered, and it not being therefore a complete record, and also as there is nothing to show that the agreement was made with the consent of the bail (*b*).

Rule discharged with costs.

(*a*) 15 East, 570.

(*b*) See *The King v. Rawson*, 2 Barn. & Cress. 598.

FENTON v. ANSTICE.

THE defendant in this case had appeared by attorney. On the 25th of April a declaration in *scire facias* on a judgment was delivered, without a notice to plead indorsed on it. On the 30th a rule to plead was obtained, and on the 16th of May a plea was demanded. On the 19th judgment was signed for want of a plea, and on the evening of the 20th a plea was delivered at the attorney's office. No objection was then made, although judgment had already been signed. Easter Term began on the 15th of April and ended on the 9th of May. A rule having been obtained to show cause why the judgment should not be set aside for irregularity with costs,

Where imparlances are abolished, notice to plead is still necessary, before the plaintiff can sign judgment for want of a plea.

Addison showed cause.—Neither by the old practice, nor by the practice as now altered, is a notice to plead necessary. It is certainly laid down in *Tidd's Practice* (*c*), that where a declaration is delivered absolutely after appearance, a notice to plead must be given, but he refers as authority to a rule of 5 & 6 Geo. 2. On reference to that rule it appears, that at that time a defendant might imparl until the next term, and that the object of that rule was to diminish the defendant's power to imparl in particular cases, and not to require a notice to plead in all cases. This rule is not applicable to the present practice, which is now regulated by the rule of Trinity Term, 1 Will. 4, s. 7 (*d*), and the Uniformity of Process Act, 2 & 3 Will. 4, c. 39, imparlances being now entirely done away with. In *Hifferman v. Langelle* (*e*), the notice to plead was left in blank, and the Court said that the defendant was bound to take notice of the practice of the Court.

(*c*) F. 473, 9th edit.
 (*d*) 1 Dowl. P. C. 104.

(*e*) 2 Bos. & Pul. 363.

Bail Court.

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 v.
 ANSTICE.

That case shows that a notice to plead is precautionary only. In this case there was a rule to plead, and it was the defendant's duty to search for that rule. The defendant cannot say he was taken by surprise, as there was a demand of plea three days before judgment was signed. It will be contended that he ought to have been allowed four days to plead after that demand, but that is not the case.—[Coleridge, J.—According to your argument, what are the cases in which it is now requisite to give notice to plead?—In no case, according to the present practice.—[Coleridge, J.—Is not the fair meaning of the decision in *Hifferman v. Langelle*, merely that if a notice to plead is given with the time in blank, the defendant is bound to take notice of what that time is?—That decision, it is submitted, goes to a greater extent. The case of *Heath v. Rose* (a), cannot be relied on by the other side, as there the declaration was delivered conditionally, and that case, moreover, occurred before imparlances were done away with.

Bagley, contrâ.—The books of practice all lay it down that there must be a notice to plead, and the rule of *Trinity Term*, 1 *Will.* 4, s. 7, does not alter that practice. A notice to plead is now indeed the more necessary, as that rule takes away imparlances. If the plaintiff intended that the rule to plead should take the place of a notice to plead, he should have allowed the defendant four days' time after the demand of plea, and he was not entitled to sign judgment at the end of twenty-four hours. The case of *Heath v. Rose*, was a case precisely like the present.—[Coleridge, J.—There the declaration was delivered *conditionally*, which is a material distinction.] The effect of not giving a notice to plead will be to give a plaintiff the opportunity to snatch a judgment, as the rule to plead is not served, but only filed.

COLERIDGE, J.—I think that this case, if it had occurred before the new rules, would have been irregular. The practice is laid down by Mr. *Tidd* to be so. Now, without reference to the new rules, if the demand of plea was to operate as a notice to plead, there should then have been the same time allowed as after a notice to plead. The case of *Hifferman v. Langelle* only shows that if the plaintiff gives a notice to plead, but omits to mention within what time, the defendant is bound to take notice of the practice of the Court as to the time. Then comes the question, do the new rules make any difference in the practice? It seems to me that the arguments for making this rule absolute are sound. The rule in terms does not do away with the necessity for a notice to plead, and on principle also I do not see that a notice to plead is rendered unnecessary. It is rather a reason why the defendant ought to have a notice to plead, that imparlances are now taken away. The judgment therefore is irregular, and must be set aside.

Rule absolute.

GYDE v. BOUCHER.

THIS was an action brought by an attorney to recover his bill, for business done by him as an attorney; and when the cause was called on for trial at the last *Gloucester* Assizes, a verdict was taken for the plaintiff for 50*l.*, subject to the award of a person to whom the cause, and all matters in difference, were referred. The costs of the cause were to abide the event, and the costs of the reference were to be in the discretion of the arbitrator. The defendant had been arrested for the sum of 28*l.* 12*s.* 5*d.* as the balance claimed to be due; but on the reference, the plaintiff, besides that claim, made another claim on a second bill, amounting to 7*l.* 19*s.* 1*d.* The arbitrator, by his award, recited the order of reference, and proceeded thus: "Now I, the said arbitrator, having taken into consideration the matters so referred to me," &c. He then directed the verdict to be entered for the plaintiff for 21*l.* 16*s.* 3*d.* instead of the nominal sum of 50*l.*; and then, without making mention of any other matters referred, he directed the defendant to pay the costs of the reference and of the award. A rule was obtained to show cause why the award should not be set aside, on the ground that the arbitrator had either included part of the claim of 7*l.* 19*s.* 1*d.*, which was not a matter in the cause, in the sum of 21*l.* 16*s.* 3*d.*, for which he had directed the verdict to be entered, or else had made no award at all as to that claim, and therefore the award was not final.

In an action by an attorney, on a bill of costs, a verdict was taken by consent, and the matter was referred, together with all matters in difference. Another bill of costs was also disputed before the arbitrator. He merely awarded that the verdict should be entered for a certain sum, and the defendant should pay the costs of the reference; without saying that that sum was for the first bill of costs, or making any mention of the second bill:—*Held*, that the award was bad.

R. V. Richards showed cause.

T. Denman Whatley, *contrà*, cited *Hutchinson v. Blackwell* (a), *Donlan v. Brett* (b), and *Dunn v. Murray* (c).

Cur. adv. vult.

COLERIDGE, J., afterwards (June 13th) gave judgment.—This was a motion to set aside an award, made under an order of *nisi prius*, by which the cause and all matters in difference were referred. The defendant had been arrested for the sum of 28*l.* 12*s.* 5*d.*, which was claimed as the balance due on a bill previously delivered. At the reference, the plaintiff produced a second bill, amounting to 7*l.* 19*s.* 1*d.*, of which the greater number of items bore date previously to the bringing of the action; but some few were for work alleged to have been done subsequently. This second bill was investigated on the reference, and the arbitrator directed a verdict to be entered for the plaintiff in one entire sum of 21*l.* 16*s.* 3*d.*; and it was objected, that either he had exceeded his authority by including some portion of the latter claim, which was only a matter in difference, in the sum for which he had entered the verdict; or that he had wholly omitted to make any award upon it, and that, as regarded this claim, his award was not final. I am of opinion that this rule must be made absolute. By the order of reference, the arbitrator was "to take into consideration the cause, and all matters in difference; and if he should find that the plaintiff was entitled to recover any damages in the

(a) 8 Bing. 331.

(b) 2 Adol. & El. 344; 4 N. & M. 854.

(c) 4 Mann. & Ryl. 571.

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said cause, then he was to ascertain the true amount thereof, and to direct a verdict to be entered for such sum as he should find to be really due, instead of the nominal damages of 50*l.*; and he was to order and determine what he should think fit to be done by the parties respecting the matter in dispute:" the costs of the cause were to abide the event, and the costs of the reference and award to be in the arbitrator's discretion. This being the order of reference, the arbitrator, by his award made of and concerning the matters referred, "*finds and ascertains* that the plaintiff is entitled to *recover damages* to the amount of 21*l.* 16*s.* 3*d.*; and directs that a *verdict* shall be entered for the said sum of 21*l.* 16*s.* 3*d.*, instead of the said nominal damages." Comparing these words with those of the order, I think they must be taken to be a finding only as to the sum claimed in the cause; and if so, there is no finding as to the matters in difference, which yet were investigated before the arbitrator, unless by directing that the defendant should pay the costs of the reference and award, or, by his silence, the arbitrator can be intended to have found that nothing was due in respect of these matters. But this intendment is unreasonable and unfounded; and by the uncertainty in which the arbitrator has left this matter, he has subjected the defendant to real inconvenience. As to the cause, if indeed the sum of 21*l.* 16*s.* 3*d.* be made up in any part of the latter claim, he is prejudiced in any motion which he might make for costs, under the 43 *Geo.* 3, having been held to bail for a larger sum (*a*). As to the matters themselves, he has not that protection against a second action, which it was one object of the reference to give him. On these grounds I think this award must be set aside.

Rule absolute.

(*a*) See the case of *Jones v. Jehu*, *ante*, p. 119.

BARRATT v. JAMES.

A defendant cannot justify bail in vacation, under 11 *G.* 4 & 1 *W.* 4, c. 70, s. 12, not having been noticed to do so by the plaintiff, under the rule *H. T.* 2 *W.* 4, I. 17.

ON the 6th of *May*, bail in this case was put in. On the 7th they were excepted to; and on the 9th, which was the last day of *Easter* Term, the defendant gave notice that the bail would justify on the 11th before a Judge at Chambers. They did accordingly justify, and were allowed, no opposition being made. A rule was this term obtained to show cause why the justification, and rule for the allowance of the bail, should not be set aside for irregularity, with costs.

Humfrey showed cause.—The question here is, whether bail being excepted to, cannot now justify at Chambers, though not called on by the plaintiff to do so. By the statute 11 *Geo.* 4 and 1 *Will.* 4, c. 70, s. 12, it is enacted, that "bail may be justified before a Judge in Chambers, or in some other convenient place, to be by him appointed, as well in Term as in vacation, and whether the defendant be actually in custody or not." It is on that enactment that the bail have justified, which they have a right to do if they think proper. The rule of *H. T.* 2 *W.* 4, I. 17 (*b*), that if bail "are excepted to in vacation, and the notice of exception requires them to justify

(*b*) 1 *Dowl.* P. C. 185.

before a judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term," will be relied on by the other side. This rule, however, is at variance with the act of 11 *Geo.* 4 and 1 *Will.* 4, unless it be construed in the following way:—The act gives power to the defendant to justify before a judge in vacation, which is a thing for his benefit; then the rule gives the plaintiff power to compel the defendant to justify bail before a judge in vacation, which he before could not be compelled to do; for otherwise, as a matter of right, the defendant has until the first day of the following term. But if the plaintiff does not force the defendant to justify under that rule, he has a right to go on until the first day of the next term. The rule, however, does not take away the defendant's right to justify under the statute, if he thinks proper. There will, therefore, be three different states of circumstances: first, the plaintiff may call on the defendant to justify within four days, under the rule; secondly, if he does not, the defendant has until the first day of the next term; but thirdly, the defendant may, if he chooses, justify under the act. There is also another answer to this application, as the rule of *H. T.* 2 *W.* 4, applies only where bail are excepted to in vacation; but in this case they were excepted to in term.

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Archbold, contra.—Before the statute 11 *Geo.* 4 and 1 *Will.* 4, c. 70, s. 12, bail could not be justified at *Chambers* unless by consent, except in the case of *prisoners*, in vacation. That enactment was to remedy that practice, and relates to the place where bail may be justified. The rule *H. T.* 2 *W.* 4, I. 17, relates to the time when bail may be justified; and the rule, therefore, is not at variance with the act of parliament. Now how does the rule alter the previous practice, by which bail could not be justified until the first day of the next term? It now has one exception to that practice, namely, when the notice of exception requires the bail to justify before a judge. If, therefore, notice is not given, the bail cannot be justified until the first day of the next term. In this case notice was not given by the plaintiff; and the irregularity complained of is, not that bail was justified at *Chambers*, but that they justified in vacation. This exception to the bail was moreover made in term time, and not in vacation, as referred to by the rule of *H. T.* 2 *W.* 4. That rule, therefore, does not apply, and the case stands on the old practice, namely, that where exception was made to bail so late in the term that there was not time to justify in the term, there could be no justification until the first day of the next term.

COLERIDGE, J.—I am inclined to think that Mr. *Archbold's* view of the Rule of Court, and the Act of Parliament, is the true one in order to reconcile them; and that the one applies to the time when, under particular circumstances, the justification may take place; and the other to the place where, under all circumstances. This rule must, therefore, be made absolute.

Rule absolute.

*Bail Court.***DOE d. BUTLER v. ROE.**

In ejectment, after a writ of possession executed, and an action for mesne profits commenced, the Court set aside the judgment and execution on payment of all the costs incurred at the instance of the landlord, who by a mistake had not had the copies of the declaration, which had been served on his tenants, delivered to him.

IN *July*, 1835, an action of ejectment had been brought, which the landlord of the premises defended, and which was afterwards dropped. In *April* last the present action was commenced for the same property, and the tenants who were served, gave the copies of the declaration to the wife of the landlord, he being at the time out. She, thinking they concerned the former action, and were of no consequence, locked them up, and on the return of her husband forgot to give them to him. Judgment was in consequence signed against the casual ejector, and a writ of possession was issued, under which the lessor of the plaintiff was put in possession, and the former tenants attorned to him. He then commenced an action for the mesne profits against the landlord, which was still pending. A rule was this term obtained by the landlord to set aside the judgment and writ of possession, on the payment of costs, and to allow the landlord to appear and defend the ejectment.

Humfrey showed cause.—It is not stated in the affidavits on which this rule was obtained, that there has been any collusion between the lessor of the plaintiff and the tenants in possession. The case of *Goodtitle v. Badtitle* (a), is an authority to show that that is necessary. The subsequent cases of *Doe d. Ingram v. Roe* (b), and *Doe d. Shaw v. Roe* (c), certainly appear in favour of this application; but in this case it is only sworn that the landlord had a good defence to the ejectment on the merits. It should have been sworn, that the deponent believed the lessor of the plaintiff had no good title. The landlord has his remedy by bringing another ejectment.

Cooke, contra, was stopped by the Court.

COLERIDGE, J.—I think, that on payment of all the costs incurred in the ejectment and in the action for mesne profits, that this rule may be made absolute.

Rule absolute accordingly.

(a) 4 Taunt. 820.

(b) 11 Price, 507.

(c) 13 Price, 260.

LLOYD and another v. KENT.

On the defendant being arrested, he agreed to a judge's order to stay the proceedings for a time, at the end of which the plaintiff was to be at liberty to sign judgment: the plaintiff cannot afterwards tax costs without giving notice, as if the defendant had not appeared. But not having done so, the Court will not set aside the judgment and execution as irregular.

ON the 18th *April* last, the defendant in this cause was arrested, and an agreement was made between the defendant and the plaintiffs' attorneys, and an order of a judge at chambers was consented to, that the proceedings should be stayed for one month, at the end of which time the plaintiff should be at liberty to sign judgment for 60*l.* with interest and costs; and this was to be without prejudice to the plaintiffs' right to bail. Judgment was not

signed until six weeks after this order was consented to, and the plaintiff proceeded to tax his costs, without giving notice of the taxation to the defendant. A rule was in consequence obtained for setting aside the taxation of costs, the judgment, and the *feri facias*, for irregularity. The affidavits in opposition stated that the usual costs only were allowed.

Bail Court.

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*Shce* showed cause.—Notice of taxation is not necessary where the defendant has not appeared. The rule of *Trinity* Term, 1 *Will.* 4, 12 (a), requires one day's notice of taxation of costs; but by the rule of *Hilary* Term, 4 *Will.* 4, 17 (b), it is declared, that where the defendant has not appeared, it is not necessary to give notice of taxation. Here the defendant was arrested, and has not appeared either in person or by attorney. It cannot be contended that the agreement made between the parties, and the order consented to, amounts to an appearance. Even should the Court be of a contrary opinion, and that there has been some irregularity, the case of *Perry v. Turner* (c) is an authority to show that the Court will refer it back to the master to see if the defendant has been damaged, and will not make this rule absolute.

*Mansel, contrâ.*—The rule of *Trinity* Term, 1 *W.* 4, is express that there must be notice of taxation. The rule of *Hilary* Term, 4 *Will.* 4, 17, contains an exception, and the question is, whether in this case there has been an appearance, or what is tantamount. The agreement was in fact an agreement that the defendant should be considered in Court, and the plaintiff himself treated it as such when he signed judgment. The plaintiff will not be prejudiced by this rule being made absolute, except so far as regards any excess in the taxation.

COLERIDGE, J.—I have no doubt this case is not within the rule of *Hilary* Term, 4 *Will.* 4, 17. I think when that rule is examined it cannot be said to apply to a case where the parties go before a judge at chambers and agree that judgment should be signed on a certain day, and that it is impossible after that for the plaintiff to say that the defendant has not appeared. But after the case of *Perry v. Turner*, I cannot treat this as an irregularity, but must send it back to the master to see if the defendant is prejudiced. I think the plaintiff was irregular in not giving notice of the taxation, but I shall not set aside the judgment; and therefore, even if there is no reduction in the taxation, the defendant must not pay the costs of this rule. There must, therefore, be a special order that this rule be discharged on the parties going before the master to see if the defendant is prejudiced. If any reduction is made, the plaintiff is to pay the costs of this rule; but if no reduction is made, then there will be no costs on either side.

Rule accordingly.

(a) 1 Dowl. P. C. 106.  
(b) 2 Dowl. P. C. 308.

(c) 1 Dowl. P. C. 300; 2 Crompt. & Jerv.  
89.

*Bail Court.***DOE d. BUTLER v. ROE.**

In ejectment, after a writ of possession executed, and an action for mesne profits commenced, the Court set aside the judgment and execution on payment of all the costs incurred at the instance of the landlord, who by a mistake had not had the copies of the declaration, which had been served on his tenants, delivered to him.

**I**N *July*, 1835, an action of ejectment had been brought, which the landlord of the premises defended, and which was afterwards dropped. In *April* last the present action was commenced for the same property, and the tenants who were served, gave the copies of the declaration to the wife of the landlord, he being at the time out. She, thinking they concerned the former action, and were of no consequence, locked them up, and on the return of her husband forgot to give them to him. Judgment was in consequence signed against the casual ejector, and a writ of possession was issued, under which the lessor of the plaintiff was put in possession, and the former tenants attorned to him. He then commenced an action for the mesne profits against the landlord, which was still pending. A rule was this term obtained by the landlord to set aside the judgment and writ of possession, on the payment of costs, and to allow the landlord to appear and defend the ejectment.

*Humfrey* showed cause.—It is not stated in the affidavits on which this rule was obtained, that there has been any collusion between the lessor of the plaintiff and the tenants in possession. The case of *Goodtitle v. Badtitle* (a), is an authority to show that that is necessary. The subsequent cases of *Doe d. Ingram v. Roe* (b), and *Doe d. Shaw v. Roe* (c), certainly appear in favour of this application; but in this case it is only sworn that the landlord had a good defence to the ejectment on the merits. It should have been sworn, that the deponent believed the lessor of the plaintiff had no good title. The landlord has his remedy by bringing another ejectment.

*Cooke, contra*, was stopped by the Court.

**COLERIDGE, J.**—I think, that on payment of all the costs incurred in the ejectment and in the action for mesne profits, that this rule may be made absolute.

Rule absolute accordingly.

(a) 4 Taunt. 820.

(b) 11 Price, 507.

(c) 13 Price, 260.

**LLOYD and another v. KENT.**

On the defendant being arrested, he agreed to a judge's order to stay the proceedings for a time, at the end of which the plaintiff was to be at liberty to sign judgment: the plaintiff cannot afterwards tax costs without giving notice, as if the defendant had not appeared. But not having done so, the Court will not set aside the judgment and execution as irregular.

**O**N the 18th *April* last, the defendant in this cause was arrested, and an agreement was made between the defendant and the plaintiffs' attorneys, and an order of a judge at chambers was consented to, that the proceedings should be stayed for one month, at the end of which time the plaintiff should be at liberty to sign judgment for 60*l.* with interest and costs; and this was to be without prejudice to the plaintiffs' right to bail. Judgment was not

signed until six weeks after this order was consented to, and the plaintiff proceeded to tax his costs, without giving notice of the taxation to the defendant. A rule was in consequence obtained for setting aside the taxation of costs, the judgment, and the *feri facias*, for irregularity. The affidavits in opposition stated that the usual costs only were allowed.

Bail Court.

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LLOYD

v.

KENT.

Shee showed cause.—Notice of taxation is not necessary where the defendant has not appeared. The rule of *Trinity* Term, 1 *Will.* 4, 12 (a), requires one day's notice of taxation of costs; but by the rule of *Hilary* Term, 4 *Will.* 4, 17 (b), it is declared, that where the defendant has not appeared, it is not necessary to give notice of taxation. Here the defendant was arrested, and has not appeared either in person or by attorney. It cannot be contended that the agreement made between the parties, and the order consented to, amounts to an appearance. Even should the Court be of a contrary opinion, and that there has been some irregularity, the case of *Perry v. Turner* (c) is an authority to show that the Court will refer it back to the master to see if the defendant has been damaged, and will not make this rule absolute.

Mansel, contrd.—The rule of *Trinity* Term, 1 *W.* 4, is express that there must be notice of taxation. The rule of *Hilary* Term, 4 *Will.* 4, 17, contains an exception, and the question is, whether in this case there has been an appearance, or what is tantamount. The agreement was in fact an agreement that the defendant should be considered in Court, and the plaintiff himself treated it as such when he signed judgment. The plaintiff will not be prejudiced by this rule being made absolute, except so far as regards any excess in the taxation.

COLERIDGE, J.—I have no doubt this case is not within the rule of *Hilary* Term, 4 *Will.* 4, 17. I think when that rule is examined it cannot be said to apply to a case where the parties go before a judge at chambers and agree that judgment should be signed on a certain day, and that it is impossible after that for the plaintiff to say that the defendant has not appeared. But after the case of *Perry v. Turner*, I cannot treat this as an irregularity, but must send it back to the master to see if the defendant is prejudiced. I think the plaintiff was irregular in not giving notice of the taxation, but I shall not set aside the judgment; and therefore, even if there is no reduction in the taxation, the defendant must not pay the costs of this rule. There must, therefore, be a special order that this rule be discharged on the parties going before the master to see if the defendant is prejudiced. If any reduction is made, the plaintiff is to pay the costs of this rule; but if no reduction is made, then there will be no costs on either side.

Rule accordingly.

(a) 1 Dowl. P. C. 165.

(b) 2 Dowl. P. C. 308.

(c) 1 Dowl. P. C. 300; 2 Crompt. & Jerv. 89.

*Bail Court.***DOE d. BUTLER v. ROE.**

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LLOYD and another v. KENT.

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signed until six weeks after this order was consented to, and the plaintiff proceeded to tax his costs, without giving notice of the taxation to the defendant. A rule was in consequence obtained for setting aside the taxation of costs, the judgment, and the *feri facias*, for irregularity. The affidavits in opposition stated that the usual costs only were allowed.

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COLERIDGE, J.—I have no doubt this case is not within the rule of *Hilary* Term, 4 *Will.* 4, 17. I think when that rule is examined it cannot be said to apply to a case where the parties go before a judge at chambers and agree that judgment should be signed on a certain day, and that it is impossible after that for the plaintiff to say that the defendant has not appeared. But after the case of *Perry v. Turner*, I cannot treat this as an irregularity, but must send it back to the master to see if the defendant is prejudiced. I think the plaintiff was irregular in not giving notice of the taxation, but I shall not set aside the judgment; and therefore, even if there is no reduction in the taxation, the defendant must not pay the costs of this rule. There must, therefore, be a special order that this rule be discharged on the parties going before the master to see if the defendant is prejudiced. If any reduction is made, the plaintiff is to pay the costs of this rule; but if no reduction is made, then there will be no costs on either side.

Rule accordingly.

(a) 1 Dowl. P. C. 166.
(b) 2 Dowl. P. C. 308.

(c) 1 Dowl. P. C. 300; 2 Crompt. & Jerv.
89.

Bail Court.

BODENHAM and others v. RICKETTS.

A *significavit* on the sentence of an Ecclesiastical Court having been set aside by the Court of Chancery for an ambiguity appearing in the sentence, and no subsequent proceedings having been taken, and there appearing no intention to proceed, the Court refused a prohibition applied for, on the ground that no good *significavit* could issue on such a defective sentence.

IN the Consistory Court of the diocese of *Hereford*, a sentence was pronounced "in a certain cause of subtraction of church rates or other ecclesiastical contribution;" it also mentioned that *Ricketts*, "in the years 1829 and 1830, or one of them, was a rated inhabitant," &c. This sentence was appealed against in the *Arches Court*, and then in the *High Court of Delegates*, and confirmed in both. Afterwards an application was made to the Court of Chancery to set aside the *significavit* which had issued on this sentence, and the Court of Chancery, on the authority of the case of *The King v. Fowler (a)*, discharged the *significavit*, on the ground that the sentence was uncertain. In *Hilary Term* last this Court discharged a rule nisi for a prohibition obtained, on the ground of want of jurisdiction in the Ecclesiastical Courts (*b*).

Sir F. Pollock now applied for a writ of prohibition to the Consistory Court, in which the original sentence was pronounced.—This sentence being clearly bad in form, as is shown by the decision of the Court of Chancery, it will be impossible for any *significavit* to issue on it which can be good. The defendant, therefore, will be liable to be perpetually harrassed by *significavits*, which cannot possibly be of any force. If the defendant were arrested on a writ *de contumace capiendo* on this sentence, and were brought by *habeas* before this Court, he would certainly be discharged. The point formerly before this Court was the want of jurisdiction, but now, by the decision in Chancery, it appears this was also an objection; and that though the Court has jurisdiction, yet it has been exercised in so informal a way, that it cannot be legally enforced. It is preferable that the defendant should come at once for a prohibition under these circumstances.

Cur. adv. vult.

COLERIDGE, J. afterwards (*June 13th*), gave judgment.—This was an application for a writ of prohibition to the Consistory Court of the diocese of *Hereford*, in a cause in which sentence has been pronounced, and for an alleged defect appearing on the face of such sentence. The application is made after the sentence has been twice confirmed on appeal, and in *Hilary Term* last this Court discharged a rule for a prohibition in the same cause. At that time a defect was relied on in an earlier stage of the proceedings; but the defect now insisted on was then in existence and within the knowledge of the applicant, and had indeed been insisted on in the Court of Chancery, in which an application was made to set aside the *significavit*, proceeding on and reciting that part of the sentence now relied on as disclosing the defect. An application thus made is certainly not to be favoured, but as the writ of prohibition issues of right, not of favour, this Court is bound to grant it, if legal grounds are laid for its issuing.

The rule is now moved for on reading two affidavits; one of them verifies an

(a) 1 Salk. 293, 350; 12 Mod. 418; 1 Ld. Raym. 586, 618; Holt, 334; Fort. 243.

(b) See this case, 1 Harr. & Woll. 753; 6 Nev. & Man. 170.

office-copy of the sentence, which appears to have issued "in a certain cause of subtraction of a church rate or other ecclesiastical contribution." A *significavit* issued upon this sentence, and reciting these words has already been set aside by the Court of *Chancery*, on the ground that these words "are ambiguous and do not show with sufficient certainty the right of the Court to issue the writ, for the other ecclesiastical contribution might not be a matter within the jurisdiction of the *Ecclesiastical Court*, of which the *King's Courts* ought to be the judges." Many other authorities might be cited to the same effect, and without canvassing for the present the distinction which may exist between the sentence and the *significavit*, it would certainly be fitting to grant the rule *nisi* on these authorities, but for the considerations which the other affidavit suggests.

This affidavit is made by Mr. *Ricketts* himself, and after giving the reason why he believes the sentence to be illegal, states, that two *significavits* have been quashed which had been issued on this sentence,—the first for irregularity,—the latter for this very defect; that according to a decision of Sir *J. Nicholl*, an *Ecclesiastical Court* is never *functus officio* until the decree is obeyed; that two writs *de contumace capiendo* have issued, founded upon this sentence in *May* last, from the *Arches Court* and the *High Court of Delegates*, and that he believes "unless the *Consistory Court* is prohibited from all further proceedings, he may be perpetually harrassed by *significavits* and writs issued in consequence of such *significavits*."

This then is a case in which a sentence has been pronounced alleged to be defective, in which a *significavit* issuing upon it has been quashed for this defect, and in which either the party promovent has not attempted, or the Court itself has not allowed him to take any step subsequently; nor is any ground alleged from which this Court can infer that any proceedings are contemplated. I have always understood in practice, and in principle it should seem to be necessary, that in order to warrant the issuing of a writ of prohibition, it should appear either that the Court below was *de facto* proceeding, or that there was ground to apprehend it was about to proceed in a matter beyond its jurisdiction, or according to a course in violation of the common law. Where the pleadings are in progress the Court is proceeding, and if upon their face it appears that the issue must be one which the Court ought not to try, it has been decided that a writ of prohibition is not premature; *Byerly v. Windus* (a). And in *Notley v. Cozens* (b), the judgment of *Buller, J.* is material to the same point; he says, "The suggestion states that the proceedings are now depending, for though a sentence has been given, yet the costs have not been paid, and they are now proceeding to compel payment of the costs, then they are in fact proceeding in this suit."

In the present case it is not stated that any proceedings are *de facto* being had or contemplated; if the sentence be substantially illegal, and cannot be reformed, why is this Court to presume that the Court below will issue any execution, or take any steps to enforce it, especially after the defect has been pointed out by the superior Court? If, on the other hand, the defect be of a kind which by the course of the *Ecclesiastical Court* may be amended by the Court below, as to which I express no opinion and have no information, why is this Court, by granting the present application, to prevent it from so doing? It

Bail Court.


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(a) 5 Barn. & Cress. 22; 7 Dowl. & Ry. 594.

(b) 1 Term Rep. 556.

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is enough however to say, that at present I see no ground for issuing a writ of prohibition, because I see no evidence of fact or presumption of law from which any illegal proceeding, or intention so to proceed, can be inferred.

Rule refused.

WHITE'S Bail.

1. If only one bail appears, he cannot justify.
 2. Notice of bail, describing one of the bail by the initial only of his second christian name, held bad.

A. S. DOWLING opposed these bail, and refused to examine one who appeared, on account of the absence of the other. He submitted that he was warranted by the usual course of practice in refusing to examine one alone.

Knowles, contra, submitted that it was a matter for the discretion of the Court.

COLERIDGE, J.—The practice, I believe, is, that one bail alone cannot justify. I shall not disturb that practice, except under strong circumstances, though I do not see the reason why one bail alone should not justify.

On a subsequent day both the bail appeared.

A. S. Dowling opposed them, and objected that the notice described one of the bail as *Joseph J. Young*, which was insufficient, as the christian name ought to be stated at full length.

Knowles, contra.—That is the only name by which the bail is known, and it may be his actual name. It should be shown on the other side that this is not his right name. There is no authority to show that a notice of bail, describing the bail by initials only, is insufficient.

COLERIDGE, J.—The argument that it is not shown that the real name of the bail is not as described, would be an answer to all the different objections that have been made to initials of a person's christian name. A rule of Court has been made expressly to meet cases of irregularity in process, where the defendant is described by initials only, if due diligence has been used to obtain knowledge of the person's name (*a*), and the argument used would apply equally to those cases, and show that rule to have been unnecessary. The defendant must therefore pay the costs of the opposition to these bail.

The bail were then examined and allowed.

(*a*) *H. T. 2 Will. 4. I. 32, 1 Dowl. P. C. 187*; and see also *stat. 3 & 4 Will. 4, c. 42, s. 12*.

PARK'S Bail.

Notice of bail, stating the residences for the last six months to be "as follows," and then describing one of the bail as of one place, and now residing at another, is sufficiently positive as to where that one has resided.

THE notice of bail stated, that "the names, additions, and particulars of and relating to the bail and their respective residences for the last six

months, have been and are as follows," one was there described, and the other as "*Elizabeth Wilmot*, widow, of 26, Half Moon Street, in the parish of St. George, Hanover Square, and now residing at 46, Jewin Street, in the city of London, and who is a housekeeper at 26, Half Moon Street aforesaid."

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Mansel objected, that this notice did not contain a positive statement where the bail had resided during the last six months.

COLERIDGE, J.—It is stated to be the respective residences for the last six months; I think it is sufficient.

Knowles supported the bail, who were then examined and allowed.

DOE d. SIR CHARLES WILLIAM TAYLOR, Bart. v. MEEKS.

ON a motion for an attachment for the non-payment of the costs taxed on the consent rule, it appeared that the affidavit of the lessor of the plaintiff, on which the motion was made, was intituled in the cause, and was in this form, "*Sir Charles William Taylor*, of, &c. Baronet, maketh oath and saith, that he did demand, &c." but omitted to describe him as "*The said Sir Charles W. Taylor*," or as "*the lessor of the plaintiff*."

It cannot be presumed that an affidavit made by a baronet, who is party in a cause in which the affidavit is intituled, is made by the person who is a party, merely from the identity of the name and addition.

Channel submitted, that it sufficiently appeared he was the same person, on account of his being a baronet, as it could not be supposed there were two of the same name.

COLERIDGE, J.—I think it is not sufficient.

Rule refused.

JACKSON v. TAYLOR.

A *Capias ad satisfaciendum*, which did not contain the *non omittas* clause, was sent to the sheriff of *York* to take the defendant into custody. The sheriff directed his mandate to the chief bailiff of the liberty of *Pickering*, in *Yorkshire*, within which the defendant resided, but by an agreement between the chief bailiff and the sheriff, the former arrested the defendant and gave him over to the custody of the latter, who carried him to the county gaol. The plaintiff obtained the usual rules to the sheriff and the chief bailiff to make a return, whereupon they each obtained time to make their returns. The sheriff returned *capi corpus*, and the chief bailiff made no return. An action was commenced against the chief bailiff for an escape.

A *ca. sa.* having issued on which the sheriff sent his mandate to the bailiff of a liberty, who obtained time to make his return, after which the sheriff returned *capi corpus*:—*Held*, that the bailiff was entitled to have the rule to make a return discharged.

Wightman applied for a rule to show cause why the rule, calling on the chief bailiff to make a return to the mandate of the sheriff, should not be discharged.

Knowles showed cause in the first instance.—The bailiff having applied for time to make his return, is now precluded from saying he is not bound to make a return at all. The sheriff has no right to interfere with this

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liberty. The case of *Boothman v. The Earl of Surrey* (a), shows that the bailiff is liable to an action for an escape. The case of *Hepworth v. Saunders* (b), recognizes the same principle; and although in that case an application, similar to the present, was successful, it was on grounds which are not to be found in the present case. Here the plaintiff has not in any way interfered to show he has admitted the defendant to be in proper custody. Besides, the bailiff, by applying for time to make his return, has recognized the proceedings against him, which entirely distinguishes the present case. [Coleridge, J.—In the cases referred to, had the sheriff returned *cepi corpus*?] No, he had not, but that will make no difference: the bailiff having recognized the plaintiff's proceedings, cannot now dispute it.

Wightman, contrd.—The sheriff having returned *cepi corpus*, the bailiff is entitled to this rule. The usual practice in cases like the present, in order to save time, is for the plaintiff to rule both the sheriff and bailiff to make a return, as it is uncertain what the sheriff may return. He may return *mandati ballivo et nullum dedit responsum*, in which case it would be then necessary to rule the bailiff; or he may return *non est inventus*, or *cepi corpus*, when it would not be necessary to rule the bailiff at all. In the same way it was necessary for the bailiff to apply for time to make his return, in order to see what return the sheriff makes. He is not, therefore, concluded from having this rule, the sheriff having now returned *cepi corpus*. The cases cited are not applicable, as in those cases there had been no return by the sheriff of *cepi corpus*. It is immaterial to the plaintiff what may have passed between the sheriff and the bailiff. If the former executes, within a liberty, a writ taken out by the plaintiff himself, not containing a *non omittas* clause, and makes a return accordingly, the plaintiff cannot call on the bailiff to make a return.

COLERIDGE, J.—This is an application made by Mr. *Wightman*, on behalf of the chief bailiff of the liberty, to discharge the rule obtained by the plaintiff, by which the bailiff was ordered to return the sheriff's mandate. It appears that when the writ of *ca. sa.* was sued out, the plaintiff delivered it to the sheriff in the ordinary form, and the sheriff then directed his mandate to the bailiff of the liberty. No return was then made, and the execution creditor obtained a rule to the sheriff, and another to the bailiff, to make a return. Both the sheriff and the bailiff then obtained further time to make their returns, and within that time the sheriff returned *cepi corpus*, and the bailiff made no return. The question now is, whether, after having obtained time for making his return, the bailiff is entitled to have his present application granted. The object of the writ of *capias* is to obtain possession of the body of the defendant, and it is immaterial to the plaintiff whether the bailiff of the liberty or the sheriff takes him. As between those parties there might be some objection, but here there is no such question between them. I do not see that the application for time by the bailiff, when he could not tell what would be done by the sheriff, precludes the bailiff from saying, now let me go free, the sheriff having returned *cepi corpus*. The rule, therefore, must be made absolute.

Rule absolute.

WICKENS v. PARKER.

THE defendant was arrested on a *capias* in this action, and on application to the Court last term was discharged out of custody, on the ground of being a certificated attorney. The rule for discharging him was made absolute on the terms of no action being brought, but it was not ordered that the defendant should enter an appearance in the action. The defendant did enter an appearance, and made a demand of declaration. A rule *nisi* was obtained this term for setting aside the appearance, and demand of declaration, for irregularity.

A defendant who has been improperly arrested on a *capias* and discharged, but without the terms of entering a common appearance, cannot treat the *capias* as if he had been served with a writ of summons, and therefore cannot enter an appearance, and demand a declaration.

Platt, showed cause.—When the defendant was discharged by the Court last term, he was in the same position he would have been had he been served with a writ of summons. He was therefore entitled to enter an appearance, and make a demand of declaration. If he was not entitled to do so, by the eighth rule of *T. T. 1 W. 4 (a)*, he would be prevented from ever signing judgment of *non-pros*. A plaintiff may, if he pleases, in all cases serve a *capias* on the defendant instead of arresting him.—[*Coleridge, J.*—The *capias* is directed to the sheriff, how can that be treated as serviceable process?—The fourth warning, which is directed by the statute 2 & 3 *W. 4*, c. 39, s. 4, and schedule No. 4, to be indorsed on the *capias*, shows that it may be served on the party.

Sir Wm. Follett, contrà.—It is usual on discharging a defendant, who has been improperly arrested, for the Court to order a common appearance to be entered; that was not done in this case, and therefore all the subsequent proceedings are irregular. The fourth warning, on the back of the *capias*, refers to those cases only where there are several defendants, and the plaintiff is desirous of arresting one or more, and not all; in which case power is specially given by the act, section 4, to serve the *capias* on those whom it is not intended to arrest.

COLERIDGE, J.—The proviso in the fourth section of the act explains that warning to mean, that if you do not intend to arrest all, where several persons are sued, as to those not intended to be arrested the *capias* is to have the effect of a writ of summons. That is the way to reconcile the two sections of the act. The first section enacts, that the process “in cases where it is not intended to hold the defendant to special bail,” &c. shall be according to the form contained in the schedule No. 1; but the fourth section enacts, “that in all such actions wherein it shall be intended to arrest and hold any person to special bail, &c. the process shall be by writ of *capias*, according to the form contained in the said schedule, and marked No. 4;” and afterwards provides for the cases where the plaintiff wishes to arrest one or more only of several defendants sued together, and it is with reference to that proviso that there is the fourth warning on the back of the *capias*. I apprehend, therefore, that you cannot now give a *capias* the effect of a writ of summons. This therefore is irregular, and the rule must be made absolute.

Rule absolute.

Bail Court.DOE *d.* All-Souls College, Oxford, *v.* ROE.

Rule nisi for judgment against the casual ejector, granted in *Trinity Term*, when the declaration was served just previous to the term, and the notice required the tenant to appear in next *Easter Term*.

THE declaration in this ejectment having been prepared to be served previous to *Easter Term*, the notice at the end of it required the tenant to appear "*next Easter Term*." The notice was dated, and the declaration served, on the 19th of *May*, three days before the commencement of this term.

V. Williams moved for a rule to show cause why judgment should not be signed, unless the tenant appeared this term and defended the action.

COLERIDGE, J., granted the rule.

Rule nisi granted.

MUSTON *v.* TABARD.

The Court will not enlarge a peremptory undertaking, on the ground that a witness is fearful that his evidence might prejudice his interest in a matter pending before the House of Lords.

BARSTOW moved for a rule to show cause why a peremptory undertaking, to try at the sittings after term, should not be enlarged. On showing cause against the rule for judgment as in case of a nonsuit, when the peremptory undertaking was given, the plaintiff stated, that the previous default in not going to trial was owing to the unwillingness of a material witness to be examined, as he expected it might prejudice his interest in some matter which was before the House of Lords. It was now stated, that that matter was still pending before the House of Lords, and that it would probably be decided before the sittings in *Michaelmas Term*.

COLERIDGE, J.—I never heard of such an objection. The witness is not out of the jurisdiction of this Court, and can therefore be compelled to appear; and when he comes before the Court to be examined, he will be protected.

Rule refused.

DEELEY *v.* BURTON.

A rule to compute may be made absolute, although the judgment has been improperly signed.

PRICE showed cause against a rule to compute principal and interest on a bill of exchange. He objected that the judgment had been signed as for want of a plea; whereas, it was shown on affidavit, that a plea was delivered in time.

J. Manning, contra, contended, that as long as the judgment stood, the plaintiff was entitled to this rule; and that if a plea was in fact delivered in time, the defendant should have applied to the Court to set aside the judgment.

WILLIAMS, J.—I cannot interfere, this is no cause against this rule. As long as the judgment stands I must consider it to be good.

Price then asked for the Court to allow the rule to stand over until he applied to set aside the judgment, but

WILLIAMS, J., refused.

Rule absolute.

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BROUGH v. SCARBY.

THIS cause had been tried before the under-sheriff, and a verdict found for the plaintiff. The plaintiff had afterwards consented, on a summons at Chambers, to a new trial. The plaintiff, however, made default at the last Assizes; nor had he tried the cause before the sheriff, as he might have done. On a rule for judgment as in case of a nonsuit,

Where a cause is tried and verdict found for the plaintiff, who afterwards consents to a new trial, but neglects to try the cause, the defendant cannot have judgment as in case of a nonsuit.

Gunning, showed cause.—The plaintiff having once taken down the cause for trial, the defendant is not entitled to this rule, but must carry down the cause for trial by proviso.

Mansel, *contrà*.—The plaintiff having given his consent to the new trial, will take the case out of the general rule.

COLERIDGE, J.—The defendant's right to this rule is given by statute, and it has always been held, that where the plaintiff has once taken the cause down for trial, it is not a case within the statute.

Rule discharged without costs.

DOE d. LINSEY v. EDWARDS and others.

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EJECTMENT. At the trial of the cause at the *Norfolk Summer Assizes*, in 1834, before *Gaslee*, J., it appeared that *Ellis Braham*, being seised in fee, devised his real estate to his widow for life, remainder to *Frances*, the wife of *John Blyford*. The lessor of the plaintiff claimed under the devise to *Mrs. Blyford*. The defendant, *Sarah Edwards*, was the widow of *Thomas Edwards*, and was the tenant in possession, and the other three defendants were her tenants. On the 16th of *November*, 1801, *Frances Blyford*, having received the rents up to that time, died. On the 26th of *November*, in the same year, the lessor of the plaintiff made an entry, and received an unstamped attornment from the several tenants. This attornment was objected to as inadmissible, first, for want of a stamp; next, because it was not made between the plaintiff and defendant, or those with whom she had any privity of estate; and lastly, because, if she was to be bound by the attornment of her husband, that attornment could only affect the land of which he was actually in possession

1. An attornment where the tenant merely puts one person in the place of another as his landlord, but continues to hold under the same terms and conditions as before, is a mere acknowledgment that the person making it is tenant, and it requires no stamp.

2. Where a tenant attorned in 1801, but the person then claiming title never entered into possession,

nor received rent; and the estate was, between 1801 and 1834, sold in several portions, and purchased by the tenant's wife, who continued in possession till nearly 1834, when ejectment was brought against her; this possession was held to be sufficiently adverse to justify the judge in nonsuiting the plaintiff in that ejectment.

3. Though the tenant, when he signed the attornment, was only tenant of one part of the estate, and his wife subsequently purchased the other portions of it—that attornment was held properly receivable in the action against her, as part of the general evidence, as to the rights of the plaintiff with respect to the estate.

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at the time he made it. The learned Judge, however, received it subject to these objections. The attornment was in the following terms:—

“ We whose names are hereunto set, being tenants and under-tenants in possession of an estate and premises within that part of the parish of *Trowse Newton* which is situate in the county of *Norfolk*, formerly the estate of *Ellis Braham*, of *Denton*, in the said county of *Norfolk*, gentleman, deceased, and late of *Frances Blyford*, of *Bungay*, in the county of *Suffolk*, widow, deceased, to which said estate and premises *George Linsey*, of *Rockland*, near *Norwich*, in the said county of *Norfolk*, yeoman, now claims to be entitled as the lawful heir or owner thereof; and as such owner and heir hath on this day made a formal entry thereon, in the name of taking possession thereof, do hereby severally attorn and become tenants and under-tenants of the said *George Linsey* from *Old Michaelmas-day* last past, of and for such part and parts of the said estate and premises as is and are in our respective occupations, at and under the several yearly rent and rents now paid by us, and under which we now hire and occupy the same; and we have this day severally paid unto the said *George Linsey* the sum of one shilling a-piece, in part of our said respective rents. Witness our hands, this 26th day of *November*, 1801:—

Daniel Bloom, tenant.

Thomas Edwards,

John Meek, + his mark,

John Beswick,

Caler Gooch, + his mark,

Adam Clarke, tenant.

John Browne, tenant.”

} Under-tenants to ditto.

Thomas Edwards was at that time in possession of a part of the estate called the *Staith*. The testator, *Ellis Braham*, had died on the 29th of *April*, 1739. On the 5th of *February*, 1773, *Frances Blyford* was admitted in fee, after a common recovery suffered, to the copyhold of *Trowse Newton*. On the 11th of *October*, 1795, she surrendered to the use of herself for life, and after her decease to *Dixon Gamble* in fee, subject to her will, and was admitted on this surrender. On the 26th of *March*, 1796, she made her will, and authorized her executors to sell the estate. The Rev. *John Gamble* was admitted as heir at law of *Dixon Gamble*, and, as administrator with the will annexed, sold the estate to different purchasers. On the 31st of *October*, 1806, *Thomas Watts* was admitted in fee to a portion of the property, and in 1807, *Jonathan Stockings* and wife were admitted in fee, on the absolute surrender of *Watts*. In the year 1806, *Thomas Edwards* and *Sarah* his wife were admitted in fee, on the absolute surrender of the Rev. *John Gamble*, to the lime-kilns and Folly-close, being a portion of the property sought to be recovered. On the 23d of *April*, 1813, *Sarah Edwards* was admitted in fee, on the surrender of *Stockings* and his wife to the *Staith* property, also a part of the property sought to be recovered in this ejectment. *Thomas Edwards* continued to occupy the *Staith* from the time he attorned up to 1807, when *Stockings* and his wife were admitted, and took possession under their purchase, In 1807, when it was purchased from them by himself and wife, he again entered into the occupation, and

continued to occupy till his death, about seven years ago, from which time it had been occupied by Mrs. *Edwards*, the now defendant, and her tenants. Questions were raised at the trial as to the estate taken by *Frances Blyford* under Mr. *Ellis Braham's* will, and also as to whether the possession of *Edwards* and his wife could, under the circumstances of this case, be considered an adverse possession. The learned Judge nonsuited the plaintiff, reserving leave to him to move upon both questions to set aside that nonsuit and enter a verdict for the plaintiff. A rule having accordingly been obtained,

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Biggs Andrews showed cause.—The nonsuit was right. The lessor relied at the trial upon the attornment in 1801. That attornment alone, without possession taken under it and rent received, will not enable the plaintiff to maintain this ejectment. The signature to the attornment of *Thomas Edwards* does not necessarily bind *Sarah Edwards*; there is no proof that at the time that attornment was made, she was married to *Edwards*. The fact that when he died she was his widow, by no means shows that when he made the attornment she was his wife. The attornment is not sufficient to prove the tenancy. *Gregory v. Doidge (a)*, shows that attornment only is no estoppel, if the party to whom it is made is not let into possession. The tenancy ought to have been proved *aliunde*. If this action had been brought against *Edwards* himself, he might have stood on his possession in answer to it.—[*Coleridge, J.*—Do you mean to argue that mere non-payment of rent, without claim set up, is as matter of law sufficient title?—It is so in this case. The effect of the attornment is gone, after a few years' possession. The attornment was not admissible in evidence. If it was an original agreement, it required a stamp, *Cornish v. Searell (b)*. It must have been an original agreement here, for there is no proof whatever but that the lessor of the plaintiff was a stranger to *Frances Blyford*. Then again this attornment never having been acted on for above thirty years, and the other party having been in possession all that time without payment of rent, he must be considered to have been in possession upon an adverse title. At all events, should the Court be against the defendant on all the other points, the only property which can be recovered under this ejectment, is that of which *Edwards* was actually in possession when he signed the attornment. With respect to that, it is submitted that acts done by him at that time cannot affect the rights of Mrs. *Edwards*, who claims under a purchase subsequently made by her, and who is not shown to have been his wife when he made this attornment.

Kelly and Manning, in support of the rule.—There is no such adverse possession here as can affect the title of the plaintiff. But if there is, it is clear that the question of adverse possession is in this case a question of fact that cannot entirely be withdrawn from the consideration of the jury. The nonsuit must therefore be set aside. Adverse possession cannot be presumed—it must be proved. It cannot be presumed so as to give a title from the mere lapse of time. In *Eldridge v. Knott (c)*, it was held that mere length of time short of the period fixed by the Statute of Limitations,

(a) 3 Bing. 474.

(b) 8 Barn. & Cress. 471.

(c) Cowp. 214.

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and unaccompanied with other circumstances, was no bar to a claim of quit rents; and Lord *Mansfield* there said, that the case ought not to have been left to a presumption of law within less time than the period fixed by the statute. In no case could mere non-payment of rent be sufficient to raise a presumption of title, but here, if any such presumption could arise from that circumstance, it is rebutted by the stronger presumption arising from the fact of attornment. There is sufficient in this case to affect the rights of Mrs. *Edwards*, and those who claim under her, for though it was not distinctly proved at the trial that she was married to *Edwards* when he made the attornment in 1801, yet no question whatever was raised on that subject, and at all events she cannot stand in a better situation than those who then held the property, and under whom she now derives title. Those persons joined her husband in making the attornment, and he signed it either as tenant or under-tenant of all the property now in dispute. In either character, his acts must bind his widow.

Cur. adv. vult.

Lord DENMAN, C. J., in this term delivered the judgment of the Court.—This was a rule obtained for setting aside a nonsuit. Several points were made in the argument, but we shall confine our judgment to one. The lessor of the plaintiff may be taken to be the heir at law to *John Linsey*, the remainder-man mentioned in the will of *Ellis Braham*. In proof of his title to recover, an instrument bearing date the 26th of October, 1801, was tendered in evidence, as an attornment made by *Thomas Edwards*, the husband of the defendant, who was one of the tenants, of one part, and an under-tenant of another part of the property now in dispute, and who with the other tenants and under-tenants, attorned to the lessor of the plaintiff, and paid him one shilling as an acknowledgment for the rent. It was objected that this attornment could not be given in evidence for want of a stamp, and the case of *Cornish v. Searell* (a) was cited as an authority. By the instrument in that case the party “attorned, and became the tenant” to two of the sequestrators named in a writ of sequestration “to hold the same for such time and on such conditions as might be subsequently agreed upon;” and it was held that that was not a mere attornment, but was an agreement to become tenant, and therefore required a stamp. It was not there contended that a mere acknowledgment of the existence of a tenancy required a stamp, and we think that in this case the instrument was nothing more. In that case *Holroyd J.* says, “Where the original landlord parts with his estate, and transfers it to another, and the tenant consents to hold of that other, the tenant is said to attorn to the new landlord. The attornment is the act of the tenant’s putting one person in the place of another as his landlord. The tenant who has attorned continued to hold upon the same terms as he held of his former landlord.” This appears to us to be the only effect of the instrument in the present case. This objection was therefore properly overruled at the trial. It was next objected that this attornment was inadmissible as against the defendant, because as it was signed by *Thomas Edwards*, and *Bloom*, and the others, for other property of which they were then tenants, it could not affect the right of the defendant as to

(a) 8 Barn. & Cress. 471.

property of which she subsequently became possessed. *Thomas Edwards* was the husband of *Sarah Edwards*, and without inquiring whether this paper was good evidence against *Sarah Edwards* upon this particular issue, it appears to us that it properly formed part of the evidence to be offered by the plaintiff in support of his general title to the property. This mode of considering the question disposes of a third objection, namely, that at the date of the attornment *Thomas Edwards* occupied a part only of the property, so that the evidence, if admissible at all, was only admissible as to that one part. In our mode of viewing it, the document was evidence as to the rights of the plaintiff with respect to the estate generally. The observations, therefore, that may be made as to the existence or non-existence of any privity of interest between the parties who then attorned and the present defendant, will not affect the question of the admissibility of the document, but only its value as evidence, the difference being not in kind but in degree. The next objection was, that from 1801 to the date of the demise, there was no evidence of any act of ownership in proof of the right of entry and possession claimed at the former period by the plaintiff; that since 1801 the attornment never had been acted upon, and that there was no evidence of any rent ever having been paid by the tenant in possession since that time, that consequently there was a sufficient adverse title to preclude the lessor of the plaintiff from now recovering. The statute of 3 & 4 Will. 4, c. 27, was not adverted to in the argument, and the action having been brought before the 1st of January, 1834, it is not necessary to consider the effect of that statute. But, considering the whole of the evidence without reference to that statute, we think that this objection to the right of the lessor of the plaintiff to recover must prevail. [His Lordship here shortly stated the facts.] During this whole period, from the death of the supposed tenant for life in 1801, with the exception of the entry and attornment, the *Edwardses* have treated this as their own property, and the solitary entry made by the lessor in 1801, with no subsequent assertion of right for more than thirty years, and nothing done upon the attornment thus procured, is not sufficient to prevent the possession from being considered as of an adverse kind. If such a possession undisputed for such a time is not to bar a claim of this sort, we cannot but ask when the right of entry claimed for the plaintiff is to cease, and when the statute of *James* is to begin to have effect? We think it better to decide the case on this point, which may be of general application, than on the other point arising upon the construction of the will, whether *Frances Blyford* took an estate for life or in tail; on which we give no opinion. But on this ground we think that this rule should be discharged.

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Rule discharged.

REX v. CHARLES HEATH.

AT the General Quarter Sessions of the Peace holden at *Petworth*, in the county of *Sussex*, on the 8th of January, 1835, an order was made on *Charles*

Where a bastard child becomes chargeable to the parish, the over-

seers ought to apply, under the 4 & 5 Will. 4, c. 76, s. 72, to the next General Quarter Sessions of the Peace for an order on the putative father; or at all events, if the application is deferred to the subsequent sessions, the overseers must show that they made diligent inquiry to discover the father, and that they did not discover him in time to give him, before the next sessions, under the 73d section of the statute, fourteen days' notice of the intended application.

Summe, that in such a case the overseers should make the application to the sessions, and get the order for the hearing respited.

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*Heath*, of the parish of *Stopham*, as the putative father of a male bastard child, to reimburse the parish of *Stopham* for the maintenance and support of the said child, under the 4 & 5 *Will.* 4, c. 76, s. 72 (a), subject to the opinion of this Court upon the following case:—*Eliza Penfield*, of the parish of *Stopham*, single woman, was on the 16th day of *August*, 1834, delivered of a male bastard child; and the said child became, on the 29th of *September*, in the same year, chargeable to the parish of *Stopham*, and continued so till the making of the said order. The Court of General Quarter Sessions “next after” the 29th of *September*, 1834, was holden at *Chichester*, for the said county, on the 13th day of *October* in the same year. No application was made by the overseers of *Stopham* for an order on *Charles Heath*, in respect of the said bastard child, until the General Quarter Sessions holden at *Petworth*, for the said county, on the 8th of *January*, 1835; nor was any notice served on the said *Charles Heath*, by the overseers of the parish of *Stopham*, of any intention to make such application, until the 9th day of *December*, 1834. It was objected on the part of the said *Charles Heath*, that the Court of Quarter Sessions holden on the 8th day of *January*, 1835, had no jurisdiction to hear the application; but this objection was overruled. The Court of Quarter Sessions also declared, that it was not necessary for the overseers to show that they had made diligent inquiry as to the father of such child, previous to the *October* Sessions; and held, that though the child became chargeable on the 29th of *September*, still that the application to the *Epiphany* Quarter Sessions was in sufficient time, under the provisions of the statute. An order was consequently made upon the defendant, and a rule had since been obtained to bring up the order to quash it.

*Darby*, in support of the rule.—The question on this section of the act has already been decided by Mr. Justice *Coleridge*, in the Bail Court, upon a motion for a *mandamus* in the case of *The King v. The Justices of Oxfordshire*(b). His lordship there held, that the general rule was, that the application must be made at the next sessions. The 73rd section requires, that fourteen days' notice shall be given to the person intended to be charged with being the father of the child; and the argument will be on the other side, that if a case should arise in which it would be impossible to give that notice, this construction of the statute cannot be carried into effect. The answer to that is, that here the notice might have been given, and that in the supposed case the parties applying to the Sessions must show the impossibility of their complying with the words of the statute. The introduction of the words respecting “diligent inquiry” cannot affect this question. The time is positively fixed by the statute, and the application, unless made within that time, cannot be entertained by the Sessions, except upon clear proof that it could not possibly be made at an earlier period.

*W. H. Watson*, in support of the order.—The argument contended for on the other side would bind the parish officers to do what is impossible; for it does not appear, on the face of the case sent to the Court, that they knew

(a) By which it is enacted, “that when any child shall hereafter be born a bastard, and shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the overseers, &c. of such parish, may, if they

think proper, after diligent inquiry as to the father of such child, apply to the next General Quarter Sessions of the Peace, after such child shall have become chargeable, for an order,” &c.

(b) *Ante*, 110.

before the *October* Sessions who was the putative father against whom they had to make an application to the Sessions. The overseers are, by the statute, directed to make "diligent inquiry" as to the putative father, and they must give him fourteen days' notice of the application. Till they have done this they cannot be heard.—[*Patteson, J.*—Then you wish us to read "the next Sessions after the child becomes chargeable," as the "next Sessions after the putative father has been discovered."—The section must be so read. The Sessions meant are the first practicable Sessions; that is, the first after the discovery of the father, and after the proper notice given him. The case before Mr. Justice *Coleridge* decides the general rule, but shows that there may be exceptions to it. The present case ought to be excepted from such a general rule, for there both the Sessions had passed by.—[*Wilkins, J.*—What would prevent the parties here from going before the Sessions and getting the order for the hearing of their application respited, on a statement that they had not been able to discover the father?—It was not necessary to do so. The Court will make every intendment in favour of the jurisdiction which the Sessions have here exercised. What is the meaning of the words "become chargeable?" There may be different acts of chargeability, and each separate act of chargeability gives a right of application to the Sessions. Every fresh payment on account of the child is a fresh ground for such application. At any time, therefore, after such chargeability arises, the overseers may apply to the Sessions and the order may be made.

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Lord DENMAN, C. J.—The objection in this case is, that the Justices at Quarter Sessions had no jurisdiction to make this order, upon the application of the overseers, in the *January* Sessions of 1835. Whether they had or not depends on the 72nd section of the act 4 & 5 *Will. 4*, c. 76, which declares, that where an illegitimate child becomes chargeable to the parish, the overseers or guardians "may, if they think proper, after diligent inquiry as to the father of such child, apply" not to the Quarter Sessions of the Peace generally, but "to the next General Quarter Sessions of the Peace after such child shall have become chargeable." It is reasonable and just that there should be some limitation as to the time for making this application, otherwise the overseers might defer proceeding until the party had lost all means of defending himself against what might be an unjust claim upon him. I think that the period within which the application is to be made, must be taken to begin to run when the child first becomes chargeable. Here the Sessions had clearly no jurisdiction for the next Quarter Sessions after the chargeability had passed by, and the application was made at a subsequent Sessions.

LITTLEDALE, J.—On the whole I am disposed to think, though I have not been without my doubts on the question, that the provision as to the time of the application is not directory, but that the overseers must apply at the first Quarter Sessions after the child becomes chargeable. It has been said, that unless the father is known it is impossible to make the application; but the words of the Statute are, "after such child shall have become chargeable," and I do not know that we are obliged to put a forced construction upon such plain language. If unintelligible, or that what we now declare must be done, cannot in some cases be complied with, that may be a reason why the

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legislature should amend the statute. But in either view of the case it is clear, that in making this order the Sessions acted without jurisdiction. It is not stated when the overseers first knew who the father was, or that they did not know him soon after the birth of the child, or fourteen days before the *October* Sessions, so as to be then in a situation to apply for the order. No ground is made out for our giving a different construction to the words of this section.

PATTESON, J.—I cannot see how to avoid the construction that has been put upon the 72nd section by my Lord *Denman* and my brother *Littledale*, for I do not understand what right we have to put upon the words in this statute a totally different sense from that which they ordinarily bear. The statute says, that “the overseers, if they think proper, may apply at the next Quarter Sessions after the child shall have become chargeable,” which language is plain and intelligible. It is stated in this case, that the child became chargeable on the 29th of *September*, and that the overseers did not apply to the Sessions in *October*, which *prima facie* were the proper Sessions. But the 73rd section is relied upon in support of the argument, that, by the first Sessions is meant the first practicable Sessions, because it is said there may not be fourteen days before the Sessions, so as to give the requisite notice. Here, however, there were just fourteen days; but whatever may be the effect of this clause, if there is not that period, I think at all events it lay upon the overseers in this case to show that the *January* Sessions were the first practicable Sessions; and that they should have been prepared with evidence to justify the postponement, and should have shown diligent inquiry to ascertain the father, and an impossibility of discovering him at an earlier period. They did not show this, and the Sessions considered it unnecessary; for any thing that appears, they might have known who was the father in *September*.

WILLIAMS, J.—On the whole I am of the same opinion. The chief argument in support of the jurisdiction of the Sessions is founded on the imperfect remedy given to the parish by the 72nd section, but the case briefly amounts to this:—*prima facie* the application was made too late; this objection was taken, and the overseers did not show why they had not applied at the proper time. If the words of the act had been the next practicable Sessions, there would have been some ground for the arguments we have heard to-day; but that is not so. They are, “the next General Quarter Sessions after such child shall have become chargeable.” The Sessions applied to were not “the next,” and no explanation was given why “the next” had been passed over.

Order of Sessions quashed.

### HARVEY v. GRABHAM and another.

Two parties entered into a written agreement by which one was to take a farm of the other, and to take the straw, chaff, &c. at a valuation to be made by such competent persons as the two parties should respectively appoint. Such agreement entire, the two parts cannot be separated from each other; and if one person only is, by parol agreement, afterwards appointed to make the valuation, the landlord cannot maintain an action upon the parol agreement thus substituted, even though the straw and chaff, &c. have been taken and used by the tenant.

**SPECIAL *assumpsit***, stating an agreement for a lease, under which the defendants were to enter into the possession of a farm of the plaintiff,

and accept it in the same condition as that in which the plaintiff was bound to receive it from the then tenants; and it was by the agreement mutually agreed between the parties thereto, that the straw, fodder, chaff, and colder, which at the time of the then tenant's quitting possession should remain upon the premises unconsumed, should be appraised and valued to the plaintiff by such competent persons as the plaintiff and defendants should respectively appoint, or by their umpire appointed in the usual way, and the amount of such valuation should be then forthwith paid to the plaintiff by the defendants. Mutual promises to perform the agreement. The declaration then stated that the defendants entered and became possessed, and that afterwards the defendants proposed to the plaintiff that the said straw, fodder, chaff, and colder, should be appraised and valued to the plaintiff by one *David Coatsworth*, on the respective behalfs of the plaintiff and the defendants, and the plaintiff having assented to the proposal, the said straw, chaff, &c., were, by and with the mutual consent and agreement of the plaintiff and the defendants, valued to the plaintiff by the said *David Coatsworth* at £39l. 7s., whereof the defendants had notice, but have not paid, &c.

Second count.—Goods and chattels bargained and sold.

The first *Plea*, beginning in the usual form of a plea to the whole declaration, stated that the first agreement in the first count mentioned was in writing, and that the variation from it was only by word of mouth, and concluded with a verification and a prayer of judgment "if the plaintiff ought to have or maintain his aforesaid action thereof against them."

The second *Plea* to the second count stated, that the goods mentioned in that count were sold under an agreement that a valuation should be made by two persons, and that such valuation had never been made, and concluded also with a verification and general prayer of judgment.

*Replication* as to the first plea.—That by means and in consequence of the proposal made, and the assent of plaintiff to such proposal, and of the said straw and chaff, &c., having been appraised and valued by *Coatsworth*, by and with the mutual consent and agreement of the plaintiff and the defendants, the said plaintiff and defendants did waive and dispense with the performance of so much of the first-mentioned agreement as related to the mode of appraising and valuing, &c.

*Replication* to the second plea.—That the goods were bargained and sold under the first-mentioned agreement in the first count mentioned; then stating the proposal, &c., to vary the mode of taking the valuation, in the same manner as in the first count of the declaration.

*Rejoinder* to the replication to the first plea.—That the said alleged waiver and dispensation of the performance of so much of the said first-mentioned written agreement as related to the mode of appraising and valuing the said straw, &c., in the said replication mentioned, and that the said alleged substitution of the said other and different appraisement and valuation in lieu thereof, in the said replication mentioned, were, and each of them was by word of mouth only, and not in writing.

*Rejoinder* to the replication to second plea.—That the first agreement was in writing, and that the said proposal, &c., was by word of mouth.

*Demurrer* to the rejoinders.—Joinder in demurrer.—The questions stated in the margin, as intended to be raised, were, whether in law the mode of valua-

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tion agreed upon in writing could be altered by parol. Also whether the pleas did not respectively profess to answer more than they afterwards answered.

Platt, in support of the demurrer.—In this case the Court will look at the whole record, and then it is clear that the judgment must be for the plaintiff, for the pleas are bad. If a plea begins with an answer to the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur (*a*). It is so here. As to the question intended to be raised upon this demurrer, it is whether an agreement in writing may not be waived as to part by parol? It is clear that it may. The greater part of the agreement here relates to an interest in land, but the portion which the plaintiff says was waived by the substitution of a parol agreement, relates to the purchase of certain goods. These are the chaff, straw, and manure. With regard to them the parol agreement is good by itself.—[*Patteson*, J.—The plaintiff here proceeds for goods bargained and sold. They must be bargained and sold under a contract. The question is, whether they were so bargained and sold under a new contract distinct from that relating to the land?—The agreement here was performed. The valuation by *Coutsworth*, who was by mutual consent appointed to make it, must be considered as a valuation made by a competent person, appointed on the respective behalfs of the plaintiff and defendants.

V. Williams, for the defendants.—The pleas are good. If a plea undertakes to answer the whole of the declaration, and then only answers part, perhaps the objection might be taken advantage of by special demurrer. But that objection does not exist here. Each plea avowedly goes only to answer a part of the declaration. If the declaration is answered, all the parts of that answer constitute but one plea, and one general conclusion is good for all. The conclusion to the first plea may be treated as surplusage. The proper conclusion is at the end of the second plea. As to the other point, this case is clearly within the Statute of Frauds, and must be decided by *Goss v. Lord Nugent* (*b*), where it was held, that parol evidence was not admissible to show the waiver of one part of an agreement, when that agreement was required to be in writing by the Statute of Frauds. The present is an agreement of that sort. It relates to an interest in land, *Waller v. Morgan* (*c*). The contract here is entire, and no part of the promise can be separated from the consideration. That consideration is the entry upon the farm and possession of the land.—[*Coleridge*, J.—As it now stands does it not amount to this, that the defendants are in possession, that the action for goods arises upon a new contract, and that the plaintiff sues in respect of the breach of that new contract?—He cannot do so, for he is not at liberty to substitute by parol a new contract for the old; *Goss v. Lord Nugent* is decisive on this point. The contract under which the defendants are in possession, is that under which the goods have been bargained and sold, and the two things cannot be separated from each other.

Platt, in reply.—This declaration is not confined to one transaction alone.

(*a*) *Wm. Saund*, 28, n. 3; *Thomas v. Heathorn*,
2 B. & C. 477.

(*b*) 5 Barn. & Ad. 58.
(*c*) 2 Cox, 369.

There are two agreements. The first, under which these defendants are in possession of the land; the second, relating to the valuation of the goods, and consisting of proposals made on the one hand and assented to on the other. The first part has been executed, and therefore the Statute of Frauds does not apply.—[*Patteson, J.*—In *Falmouth v. Thomas (a)*, the objection as to the want of a written agreement was held good, though the defendant had there received the money arising from the sale of the things which were the subject of the contract.]—In *Warren v. Stagg*, mentioned in the case of *Little v. Holland (b)*, in that case itself, in *Thresh v. Rake (c)*, and in *Cuff v. Penn (d)*, all of which were considered in *Goss v. Lord Nugent (e)*, alterations as to the performance of a written contract had taken place, and those alterations were treated as valid in actions on those contracts. The variation of the contract here is not greater than it was in any of those cases.

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Cur. adv. vult.

LORD DENMAN, C. J. (after reading the pleadings, proceeded).—It was contended for the plaintiff that the first plea was bad, because it professed to be pleaded to the whole declaration, yet contained an answer only to part; but we think it is perhaps pleaded to the first count only, though in an informal manner, which might make it liable to a special demurrer. It is not, however, competent to the plaintiff to take that objection on a demurrer to the rejoinder. The real question raised by the demurrer is, whether the waiver of the mode of valuation stated in the pleadings was binding, not having been in writing. The original agreement was in writing, and necessarily so, because it related to an interest in land. It was an entire agreement, the two parts could not be separated from each other, and the whole was therefore necessarily in writing; *Chater v. Beckett (f)*. Now assuming that it was competent to the parties to waive and abandon the whole of the first agreement by a subsequent agreement not in writing (which is, however, strongly doubted in *Goss v. Lord Nugent (g)*), yet here, as in that case, the parties have not waived and abandoned the whole, for it appears by the declaration what the lease was that was granted, that the original agreement to grant it was still subsisting, and the plaintiff avers his readiness to grant it under that agreement. What has been done is a waiver and abandonment of part only, and if that part had of itself been required to be in writing within the Statute of Frauds, the cases of *Goss v. Lord Nugent*, and *Lord Falmouth v. Thomas (h)*, are express authorities to show the waiver would not be binding, though that part might, as a contract by itself, have been good without writing, on account of the acceptance which is averred in the first count. It may be otherwise as to the second count, which is as to goods bargained and sold, and not goods sold and delivered, and it was contended that as it was competent to the parties to have made two contracts in the first instance, one in writing as to the land, and the other not in writing as to the straw and manure, so it was competent to them afterwards, by an agreement not in writing, to separate the two parts of the original agreement,

(a) 1 Crom. & Mee. 89; 3 Tyr. 26.

(b) 3 Term Rep. 591.

(c) 1 Esp. N. P. C. 53.

(d) 1 Maule & Selw. 21.

(e) 5 Barn. & Ad. 58.

(f) 7 Term Rep. 201.

(g) 5 Barn. & Ad. 58.

(h) 1 Crom. & Mee. 89.

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and to substitute a new agreement, not in writing, as to straw and manure. We think that it is not so, but that the agreement being entire in the first instance, must so continue, and it cannot be separated or altered otherwise than by writing. If it could it would follow that, should the present plaintiff hereafter refuse to execute the lease, the present defendants, in suing for such refusal, would be obliged to state the altered agreement with the consideration, and aver a readiness to perform it, and then to prove their case partly by writing and partly by oral evidence—the very predicament which the Statute of Frauds was intended to prevent. It was attempted to be argued that the original agreement was performed, inasmuch as one person named by mutual consent, would be considered a competent person respectively appointed by the parties, but we think this construction cannot reasonably be put upon the words of the agreement, neither has the plaintiff attempted so to treat it, for he has, both in the first count and the replication to the plea, expressly alleged a waiver of the original, and a compliance with the substituted agreement. Judgment must therefore be given for the defendants.

Judgment for the defendants.

REX v. The Inhabitants of WITNEY.

Where two justices of a county have concurrent jurisdiction with the justices of a city, which is not a county of a city, they may, though they have not qualified as justices for such city, sign an allowance of the indentures of a pauper bound apprentice by the overseers of a parish within the city to a person residing in a town within the county. And such allowance by them alone will be good under the 56 Geo. 3, c. 139.

The party relying upon the indenture at the sessions need not prove notice to the overseers of the parish into which the pauper was bound apprentice. The want of notice should have been proved at the sessions by the other party. The allowance of the indenture by two justices raised the presumption that all that the statute required to be done before such allowance was made had been properly done.

ON appeal against an order of removal, by which *James Price*, his wife and child, were removed from the parish of *St. Clement*, to the parish of *Witney*, the sessions confirmed the order, subject to the opinion of this Court upon a case which stated, that by an Act of Parliament passed in the 11th year of King *Geo. 3*, intituled "An Act for the better regulating the Poor within the city of *Oxford*," the mayor, &c., were constituted guardians of the poor within the city of *Oxford*; and by the 17th section of the act it was enacted, "That all poor children who at any time should be maintained by the said guardians, should be and remain under their government till they should attain the age of fourteen years," and after such children should attain the age of fourteen years respectively, or sooner, if the guardians should think fit, power was given to the said guardians, at any monthly or special Court, by writing under their common seal without stamp, to bind and put forth any such children apprentices to any respectable person in *England*; and it was declared that such writing should be mutually binding as an indenture between the master and mistress and the apprentice, and that the apprentice should gain, and be entitled to gain a settlement under such indenture, and that the same should in all respects be enforced according to the laws in force concerning the binding out of poor children apprentices, whose parents are not able to provide for them. On the part of the respondents, a deed of apprenticeship under the common seal of the guardians was put in, bearing date the 7th of *March*, 1822, by which the pauper, *James Price*, was apprenticed to *Thomas Harris*, a watchmaker, in the appellants parish of *Witney*. The original order of two justices of the county of *Oxford* for the binding was annexed to this indenture of apprenticeship, and at the foot of the indenture appeared the allowance of the apprenticeship

by the same two justices. The deed of apprenticeship was not allowed by any other than these two justices, who were justices of the county of *Oxford*, but not of the city of *Oxford*. The city of *Oxford* has justices of its own, under the authority of two several commissions issued under the Great Seal, one being a commission of gaol delivery, and the other of the peace, and which are severally directed to certain noblemen and gentlemen, who are justices of the county, and to the mayor, recorder, aldermen, and assistants of the city. But the administration of justice under such commissions has hitherto been conducted by the mayor, &c., only, and they alone have been accustomed to qualify as justices for the city. These justices of the county of *Oxford* have, however, a concurrent jurisdiction in the city of *Oxford*, excepting only within a small part of it, which is locally situate in *Berkshire*, where the justices of that county have a like concurrent jurisdiction. It did not appear by the deed of apprenticeship, or any indorsement thereon, nor was it made to appear at the hearing of the appeal, that any notice of the apprenticeship had been given to the overseers of the appellant parish, nor that any overseer of the appellant parish had attended before the justices and admitted such notice. The execution of the deed by the guardians, by affixing their common seal, was proved by the attesting witness, the then clerk of the guardians, but no evidence whatever was given by the respondents with respect to the notice. The pauper served more than forty days under the apprenticeship deed, in the parish of *Witney*, and the questions for the opinion of the Court were—first, whether the order and allowance of the apprenticeship ought not to have been made by the justices of the city of *Oxford*?—secondly, whether under the circumstances it was incumbent on the respondent parish to prove that notice of the intended apprenticeship had been given to the appellant parish of *Witney*, before the allowance of the indenture, or that an overseer of that parish had attended before the allowing justices, and admitted such notice?

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Maule and *Cooper*, in support of the order.—It is questionable whether there need have been any allowance at all of the order. The object of the 16 Geo. 3, c. 139, was to put the power of binding poor apprentices into the hands of the justices of the county at large. For the purposes of that act the city was within the county. There was no necessity for proving any notice to the overseers in this case.—[Lord *Denman*, C. J.—Was there not a case of *Rex v. Whiston* (a) lately before us, in which we held that all must be presumed to have been properly done which circumstances required, and where the order itself did not show any omission or irregularity?]
 —There was such a case, and that gets rid of *Rex v. Threlkeld* (b), which will be relied on by the other side, but which is distinguished from the present, for there it was found as a fact that notice was not given; here it merely appears that no evidence of the notice was given on the hearing of the appeal. For the purposes of this settlement it must now be presumed that every thing was rightly done. In *St. Devereux v. Much Dew Church* (c), it was held, that for the purpose of a settlement the entry in a registry of a marriage celebrated by banns was sufficient, though neither the minister, parties, nor witnesses had signed it, and though the publication of banns was not proved. In such

(a) 1 Harr. & Wol. 696.

(b) 4 Barn. & Ad. 229.

(c) 1 Sir W. Bl. 367.

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a case as the present, if there is a subsequent act which cannot be properly done without a previous act being done, and if the subsequent act is done the Court will presume that the previous one was regularly performed (a), for otherwise there would be no knowing when rights depending on these formal matters of proof were safe from being impeached.

Chilton and Richards, contrà.—The proof of notice is indispensable to the validity of this order. This case cannot be distinguished from *Rex v. Threlkeld*, and from *Rex v. Newmark* (b). The allowance of these justices is clearly insufficient. The 3 & 4 Will. 4, c. 63, was passed to remedy the inconvenience arising from the necessity imposed by the 56 Geo. 3, c. 139, of having four justices to allow the indenture. That number was declared, in the case of *Rex v. Shipton* (c), to be indispensable, although in that case the justices allowing were justices for both counties. This Court has, therefore, put a construction on the 56 Geo. 3, and the legislature has recognized that construction, and has altered the law for the future. The parties here ought to have got the indenture allowed both by the justices of the particular jurisdiction, and by those of the general jurisdiction.—[*Littledale, J.*—The 3d section of the act says, that the allowance of two justices for the county shall be valid, though the place within which such child is intended to be bound may be a place in which other justices have exclusive jurisdiction.]—That section does not apply to this case, for *Witney*, into which the apprentice was bound, has no such jurisdiction. There is nothing here to show that the justices for the county acted for the city, on the contrary, it appears that though entitled to exercise jurisdiction in the city, the justices for the county do not qualify for that purpose.—[*Patteson, J.*—But the city is within the county just as much as any other town in *Oxfordshire*.]—Yes, but the justices of the county do not appear generally to act for it, and cannot do so in this instance.

LITTLEDALE, J. (d).—As to the question whether it was necessary for the respondents to prove notice of the apprenticeship to the parish of *Witney*, that is decided by the case to which Lord *Denman* has alluded (e), and which case, I think, was very properly decided upon the principle, that where an act of a public officer appears to be good upon the face of it, it shall be presumed that every preliminary act was done which was essential to give validity to that act. It is very convenient that we should abide by that principle. It seems to me also that the other point is quite clear. The justices who made the order and the allowance of the apprenticeship were justices of the county, having concurrent jurisdiction in the city of *Oxford* with the justices of that city. Both *Witney* and *Oxford* then were places within the same jurisdiction, and even if at *Witney* there were justices who had exclusive jurisdiction, the allowance by the county justices would have been valid by the third section, notwithstanding any exclusive jurisdiction. The justices here would have had a different and limited jurisdiction, if they had

(a) *Williams v. The East India Company*, 3 East, 192.

(b) 4 Dowl. & Ryl. 745, and 3 Barn. & Cres. 59.

(c) 8 Barn. & Cres. 772.

(d) Lord *Denman*, C. J., had left the Court.

(e) *Rex v. Whiston*, 1 Harr. & Wol. 696.

only qualified as justices of *Oxford*, but they have the same jurisdiction in the two places, having qualified as justices for the county.

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PATTERSON, J.—I have no doubt upon either of the points submitted to our consideration. When the Act of Parliament in the second section speaks of the place of residence of the party with whom the child is intended to be bound as within a different county, or jurisdiction of the peace, it seems to me that it must have contemplated a jurisdiction that was exclusive and altogether different from the jurisdiction in which the place of the officers binding is situate; and the third section provides that the allowance by justices of the peace of the county within which the place in which the child shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place may be situated in a town or liberty within which any other justices of the peace may in other respects have an exclusive jurisdiction. The justices who allowed the apprenticeship in the present instance were justices having a concurrent jurisdiction with the justices of the city. With respect to the other point, that has already been decided by a case within the recollection of the Court, which was determined in *Hilary* Term last (a). I was not in the Court in that term, but I fully concur in the correctness of the decision. As notice was necessary for the purpose of rendering the order and allowance by the justices valid in point of law, it is to be presumed, until the contrary be proved, that notice to the overseers of the parish in which the pauper was bound was given, and the production of the order and allowance is *quasi* proof of itself of notice having been given.

WILLIAMS, J.—It is clear from this case, as stated (there being no statement of any *non intromittat* clause with respect to the city of *Oxford*), that the justices of the county of *Oxford* were acting both for *Witney* and for *Oxford*. The words of the act are, "That in all cases where the residence or establishment of business of the person or persons to whom any child shall be bound, shall be within a different county or jurisdiction of the peace from that within which the place by the officers whereof such child shall be bound shall be situated, &c., every indenture by which such child shall be bound shall be allowed as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve." Here both the place of the binding officers, and of the residence of the party to whom it was intended to bind the child, were within the same jurisdiction. With respect to the other point, as it would have been an illegal act on the part of the justices to sign the allowance of the indenture, unless it had been proved to them that notice had been given to the overseers of the parish into which the child was to be bound, or unless one of the overseers attended and admitted notice, the presumption of law is, that the magistrates did not make the order and allowance without having such proof before them.

Order confirmed.

(a) *Rex v. Whiston*, 1 Har. & Woll. 696.

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TIBBITTS, Assignee of FRANCES THOMPSON, an Insolvent,
v. GEORGE.

If *A.*, in order to pay *B.* a sum of money, assigns to *B.* all his interest in a debt due from *C.*, it is not necessary that a strictly formal notice of such assignment should be given to *C.*

An assignment thus made of an equitable interest need not be in writing, nor, if *C.* assents to the assignment, will the insolvency of *A.* before the whole transaction is complete, vest the right to the debt assigned in the insolvent's assignees.

Though the debt assigned may be more than will cover *B.*'s demand, the existence of a residuary interest in it in *A.* will not prevent the vesting of the assignment in *B.*, nor make him a trustee for *A.*'s assignees; their interests are separate and independent.

ASSUMPSIT, for money had and received. The cause was tried before Mr. Justice *Littledale*, at the Spring Assizes for *Northamptonshire*, in 1835, when it appeared, that in the early part of *February*, 1833, Mrs. *Thompson* applied to the defendant for a loan of money. She had formerly lived as housekeeper in the service of a person named *Mercer*, and had saved while in that service a sum of 400*l.* *Mercer* became a bankrupt in *February*, 1832, and upon his bankruptcy this application for the loan was made. The solicitor to the fiat against *Mercer* was a person named *Archbold*. The defendant acquainted him with the application of Mrs. *Thompson*, and requested to know from him what was the probable amount of the dividend to be expected from *Mercer's* estate; and was told that it would be about five shillings in the pound, and that he might safely make an advance calculated on that amount. The defendant then agreed to advance Mrs. *Thompson* a sum of 100*l.* on her assigning to him her interest in the dividend upon *Mercer's* estate. A sum of 50*l.* was advanced at the time. Mrs. *Thompson* afterwards became indebted to the plaintiff, who in *July*, 1833, obtained a verdict against her, and she was taken in execution in *August* of that year. She petitioned for her discharge from prison on the 17th of *September*, and all her estate and effects were duly assigned to the plaintiff on the day of the filing of the petition. In *June*, 1833, the defendant advanced a further sum of 50*l.*, and an authority to receive the dividend was then given to him in writing by Mrs. *Thompson*. In *August* a formal assignment of her interest in the dividend was executed. In *November* a dividend was declared upon *Mercer's* estate, and the defendant received from his assignees the sum of 80*l.* 17*s.* 6*d.*, the sum claimed in the present action. The insolvent had stated in her schedule, filed in the Insolvent Debtors' Court, that the debt due to her from *Mercer* had been assigned by her to the defendant on the 5th of *August*, 1833, as security for a debt of 105*l.* It was admitted that the written authority to receive the dividend, and the formal assignment of it by Mrs. *Thompson*, were void within the Statute 7 *Geo.* 4, c. 57, s. 32, she being at that time in insolvent circumstances, and the defendant relied on the parol agreement made at the time of the loan, as an equitable assignment of Mrs. *Thompson's* interest in the dividend, for valuable consideration then passing between the parties. The jury found a verdict for the defendant, but the learned judge gave the plaintiff leave to move to enter a verdict for the plaintiff for the sum of 80*l.* 17*s.* 6*d.*, if the Court should be of opinion that the agreement to pay out of the dividends was not an equitable assignment of those dividends to the defendant. A rule having accordingly been obtained for that purpose,

Adams, Serjt., and *Humfrey* showed cause.—This was a valid agreement. It was made at the time that Mrs. *Thompson* was solvent, and was made for a valuable consideration passing at the moment. The cases decided on the statute are all cases where the security has been given within three months of the insolvency, and in contemplation of it; and to such cases alone is the statute applicable. It does not apply here. This agree-

ment was binding upon Mrs. *Thompson* at common law, and the defendant could have maintained an action upon it.

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Waddington and *Miller*, in support of the rule.—No interest in the debt passed by this assignment. First, the defendant was bound to give notice of the assignment to the holder of the fund; secondly, a parol promise will not pass even an equitable interest; and thirdly, the assignment did not pass all the insolvent's interest in the fund; the residue was still in her, and consequently the legal interest in the fund passed to her assignees. As to the first point, a debt due to the insolvent will pass to the assignee, although it has been assigned to a third party before the insolvent's imprisonment, if notice of such assignment was not given to the debtor before such imprisonment; *Buck v. Lee* (a). No such notice was proved here. The principle laid down in *Buck v. Lee*, was acted upon in bankruptcy, in *Ex parte Coloill* (b), with respect to Life Insurance Policies.—[*Patteson, J.*—And also in *Ex parte Mabery*.]—In *Watson v. The Duke of Wellington* (c), all the authorities on this point were referred to. There the Marquis of *Hastings* had promised to satisfy a bond creditor out of his claim upon the Deccan prize-money, and wrote a letter to Colonel *Cole*, the distributor of the fund, to effectuate the promise; but the Master of the Rolls held that this was no assignment, and treated the parol promise as nothing. On the authority of that case the second point is made out, for that case distinctly shows that a parol promise will not pass even an equitable interest, so that if the insolvency of Mrs. *Thompson* had not intervened, the assignee of *Mercer* would not have been even an equitable trustee for the defendant. As to the third point, even supposing that the parol agreement, at the time it was made, gave an equitable right to the defendant to claim payment out of this fund from the assignee of *Mercer*, still, as at the time of her insolvency, Mrs. *Thompson* retained a residuary interest in the fund, the legal estate in the fund passed to her assignee; *Carvalho v. Burn* (d), is decisive on this point.—[*Littledale, J.*—You contend then, that if this agreement had been properly executed in 1832, the fund would not have passed?—]It would not. The authority of *Carvalho v. Burn*, which was affirmed in a Court of Error (e), has been distinctly recognized in *Leisle v. Guthrie*, reported only in *Hodges* (f)—[*Cole-ridge, J.*—But the intention appears to have been to transfer the whole of the fund, for the loan was calculated on the amount of the dividend.]-Still whatever the intention was the whole would not pass.—[*Patteson, J.*—This is not a question between the assignee and the debtor, but between the assignee and a creditor. Here the *cestui que trust* has received the money, whereas you say the trustee ought to have received it. Is there any authority to show that the trustee can sue the *cestui que trust* under such circumstances?—]Yes, *Carvalho v. Burn* is an authority. It is identical with the present case. The defendant there was a creditor, who by virtue of an assignment had an equitable interest in the goods, and yet the assignees recovered. *Best v. Argles* (g) is also an authority to the same

(a) 1 Ad. & Ell. 804.

(b) 1 Mont. 110.

(c) 1 Russ. & Myl. 602.

(d) 4 Barn. & Ad. 382.

(e) 1 Ad. & Ell. 883.

(f) 1 Hodges, 83.

(g) 2 Cr. & Mes. 394.

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point. There the transaction was complete long before the bankruptcy, except in the payment over of the money. It ought, however, to be stated, that in Mr. Baron Bayley's judgment in that case, he laid much stress on the fact that the assignment there was in respect of a past consideration, though he did not state that, had the fact been different, the judgment of the Court would have been altered by it. *Row v. Dawson* (a) is the only authority which appears to be against the plaintiff, but that was a direct transfer of the fund itself in respect of an advance of money made at the time.

*Cur. adv. vult.*

Lord DENMAN, on the last day of *Trinity* Term, delivered the judgment of the Court.—After stating all the circumstances of the case, his Lordship said :—The first objection to the right of the defendant to retain this money was, that it remained in the order and disposition of the insolvent for want of notice of the assignment being duly given to the debtor or his assignee. Secondly, that a parol agreement to allow the defendant to receive the dividend would not pass even an equitable agreement; and thirdly, that as all the insolvent's interest in the fund was not passed by this assignment, but she still retained an interest in the surplus, the right to the whole fund passed to her assignees. As to the first point, we think it is not necessary that a strictly formal notice should be given to the debtor, of the fact of the assignment. Some notice is required, and in this case we think that there was sufficient to prevent a fraud upon the debtor, which is all that the cases upon this point have had in view. As to the second point, we do not think that there must be an assignment in writing, in order to pass an equitable interest; and as to the express assent of the debtor to such an assignment, it has been held that it is sufficient if he does some act to recognise it, or does not declare his refusal to conform to it, *Ex parte South* (b), and *Williams v. Everett* (c). It is sufficient if the engagement by the debtor appears to be, that a particular fund should be charged with the debt. In this case the consent of *Archbold* might be treated as that of the assignee of *Mercer*. Then it is said that the thing assigned would not pass, the transaction not being in every respect completed before the insolvency, and *Best v. Argles* has been cited in support of that argument. That case certainly approaches nearly to the present, but it is not the same. There the executor absolutely refused at first to act upon the assignment, and the bankrupt, after his bankruptcy, received the money into his own hands, and paid it over to his creditor. That circumstance makes a great difference in the case, and on the whole we think that in that respect this case is free from doubt. As to the third point, it does not appear to us that *Carvalho v. Burn*, as it was treated, either when before this Court or before the Court of Error, is applicable to this case. There the fund out of which the payment was to be made was uncertain. It might never exist at all. Here the debt assigned as a security was certain. The whole of the dividend, if it exceeded the debt for which it was assigned, would not pass under the assignment, but would remain in the insolvent—therefore neither the plaintiff was trustee for the defendant, nor was the defendant trustee for the plaintiff. The interest of each was separate and distinct.

Rule discharged.

(a) 1 Ves. 331.

(b) 3 Swanst. 392.

(c) 14 East, 582.

## REX v. The Justices of CORNWALL.

A RULE had been obtained, calling on the Justices of *Cornwall* to show cause why a *mandamus* should not issue, requiring them to enter continuances and hear an appeal. It appeared on the affidavits that *Charles Halvoso*, who was settled in *St. Gluvius*, his wife, and her three children by a former husband as part of the family of *Halvoso*, were removed by an order from the parish of *Penryn* to *St. Gluvius*. The order proceeded on the examination of the wife, as well as of the husband, and the wife stated that her former husband belonged to the borough of *Penryn*, and that by him she had three children, who were under the age of thirteen, and lived with her and her present husband, and had done no act to gain a settlement in their own right. The order then set forth the names and description of the children, "*William, Azimuth, and Emily*, the son and daughters of the wife of the said *Charles Halvoso*, by a former husband, neither of whom has gained a settlement in his or her own right." Notice of appeal was given by the parish of *St. Gluvius*, and after giving the names and ages of the children, the notice stated as a ground of appeal, that they "are and each of them is now settled in the said borough of *Penryn*." The Quarter Sessions confirmed the order, having refused to hear the evidence tendered on the part of the appellants, because it was not stated in the notice of appeal how the children named in the order of removal were settled in the borough of *Penryn*.

Where a parish, on giving notice of appeal against an order for the removal of three children, the issue of the wife of a pauper by a former marriage, simply stated in the notice of appeal the names of the children, the fact that they were under thirteen, and named the parish in which they were settled; such notice was held sufficient under sec. 81 of the 4 & 5 Will. 4, c. 76.

*Archbold* showed cause against the rule for the *mandamus*. The notice of appeal is not sufficient within the 81st section of the statute. It ought to have stated in what right the children were settled in *Penryn*, so as to enable the respondent parish to be prepared on the question really intended to be raised at the sessions. It did not state whether the settlement was that of their parents, or by birth, or hiring, or service, and that parish had no means of knowing how to meet the charge intended to be fixed upon it.—[*Williams, J.*—Did it state the names and ages of the children?—It did. If the settlement of the children was derived from that of the father, there should have been a statement what his settlement was.

*Sir W. Follett*, in support of the rule.—The sessions were bound to hear this appeal. The statute requires "a statement of the grounds of appeal," but not of every circumstance connected therewith. The notice must be construed with reference both to the examination of the mother and to the order against which it is an appeal. If that is done the grounds of appeal are most clearly intelligible, and the parish could not be taken by surprise. The examination and order show that there was but one mode by which the children could be settled in *Penryn*. The question intended to be raised was, which of the two parishes was to be at the expense of maintaining the children while they continued, under the 57th section of the new act, to form part of the second husband's family, and the notice is sufficient to raise that question.

Lord DENMAN, C. J.—It appears to me that this rule must be made absolute. The justices have declined hearing evidence which was necessary to

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raise a very important point, upon which the appellants were anxious to take the opinion of the sessions. The statement of the notice which the sessions held to be insufficient was, that the children were settled in the borough of *Penryn*. Sir *W. Follett* has argued, that taking the examination upon which the justices made their order with the order itself, and with the ground of appeal stated, there could be but one mode in which the children could by possibility be settled in *Penryn*. But without putting it upon that ground, with which we do not quite agree, it appears to me that sufficient information is given by the notice itself. It is quite sufficient that the ground of notice as stated calls the attention of the adverse party to the fact of the pauper being settled in a particular parish, so as to enable them to inquire whether there is any foundation for the supposition that he is settled in that place. The point, therefore, was properly raised upon this notice of appeal, and the sessions ought to have heard and decided it.

LITLEDAL, J.—I am of opinion that the notice of appeal in this case was sufficient. Before the new act it would have been sufficient to have given notice of appeal generally, but that act requires that the grounds of appeal should be stated. By giving notice, and stating as a ground of appeal that the pauper is settled in a parish, it appears to me that the appellants have sufficiently complied with the requisites of the statute.

PATTESON, J., and WILLIAMS, J., concurred.

Rule absolute.

### LLOYD v. WOOD.

A writ of attachment against *B.* issued from the Court of *Chancery* at the suit of *A.* The sheriff attached *B.* by his body. *B.* was discharged from custody as privileged from arrest. In an action upon the case by *A.* against the sheriff for a negligent discharge of his duty, *A.* must state precisely the nature of the privilege which prevented the ordinary duty of the sheriff from attaching with regard to *B.*, and for want of such statement the declaration will be bad on general demurrer.

*Quere*, whether an action can be maintained at all by *A.* against the sheriff, under such circumstances.

CASE against the Sheriff of the county of *Northampton*. The declaration stated, that before and at the time of making the order and committing the grievance thereafter mentioned, a certain suit and cause had been brought, and was then pending in His Majesty's High Court of *Chancery*, wherein one *Frederick Tertius Jeyes* was plaintiff, and one *Robert Foreman* and the now plaintiff were defendants; and such proceedings had been and were had in that suit and cause, that on &c., it was by a certain order directed that the said *F. T. J.* should, within three days after service of a writ of execution of that order, to be verified by affidavit, pay into the bank, with the privity of the accountant-general of that Court, to be there placed to the credit of the cause, certain sums therein specified; that the time for payment was by subsequent orders extended, and that for the purpose of having execution of the order, the now plaintiff caused to be sued and prosecuted out of the Court of *Chancery* a certain writ, &c., directed to the said *F. T. J.*, enjoining and commanding him to perform all matters and things mentioned in the order, &c., which writ of execution was afterwards, to wit, on &c., personally served on *F. T. J.* That the said *F. T. J.* did not nor would comply therewith, but wholly neglected and refused to do so; that thereupon the plaintiff did afterwards, to wit, on &c., verify the service of the writ of execution by affidavit, sworn before a Master Extraordinary in *Chancery*, &c., and the plaintiff did, to wit, on &c., cause to be sued out a writ of attachment against *F. T. J.*, directed to the Sheriff of the county of *Northampton*, &c., which said writ of attachment was delivered to the de-

defendant (the sheriff), and thereupon it became and was the duty of the said defendant, as such sheriff, to execute the said writ in a careful and proper manner; yet the defendant, not regarding his duty in that behalf, afterwards and before the return of the said writ of attachment, to wit, on &c., as such sheriff, wrongfully, carelessly, and improperly, and against the consent of the plaintiff, attached the said *F. T. J.* by his body, under colour and in execution of the said writ of attachment, he the said *F. T. J.* being then privileged and protected from being so attached, and the defendant well knowing the premises; and the defendant as such sheriff kept and detained the said *F. T. J.* in his custody under the said attachment, and under colour and in execution of the said writ of attachment, from thence until and at and after the return thereof, to wit, on &c., when the said *F. T. J.* applied for his discharge out of the custody of the sheriff, for and by reason and in consequence of the said *F. T. J.* having been so attached as aforesaid, at a time when he was privileged and protected therefrom, and an order was accordingly made for his discharge. And by means of the premises the plaintiff lost and was deprived of the benefit of the said writ of attachment, and was delayed and hindered in forcing and compelling *F. T. J.* to pay the sums, as by the said writ and order he was commanded, and that the said money was not paid into the bank to the credit of the accountant-general in the said cause, and the plaintiff was put to and incurred great costs, charges, and expenses, amounting to 100*l.*, and was obliged to take divers journeys, and was put to great trouble and inconvenience in and about the causing to be issued another writ of attachment, and was also compelled to pay the costs of opposing the discharge of *F. T. J.*, &c.

*Demurrer*, showing for cause that it is not stated in the declaration whether the defendant was directed to attach the said *F. T. J.* by his body or by his goods, nor does it fully set out the writ, or show sufficient for the Court to say whether the sheriff was bound under the writ to attach the said *F. T. J.* by his body or goods, nor in what respect the said *F. T. J.* was privileged, or that defendant acted maliciously.

*Joinder* in demurrer.

*Peacock*, in support of the demurrer.—The declaration here is insufficient. The action itself being an action not by the party claiming privilege, but by the party issuing the writ, is of the first impression, and there is no authority to show that such an action can be maintained. In *Tarleton v. Fisher* (a), it was held, that a sheriff or his officer is not necessarily bound to take notice of an alleged privilege. The plaintiff there was the party claiming the privilege. *Cameron v. Lightfoot* (b), and *Crosby v. Shaw* (c), were there cited. The question of privilege is a question of law arising upon matter of fact, and the fact ought to be properly stated in order to raise the question of law (d).—[Lord Denman, C. J.—Has there not recently been a case of this kind decided in the *Eschequer*, under the name of *Stokes v. White* (e)?]—There has, but there the party suing was also the party claiming the privilege. If the facts had been properly stated on the pleadings, the

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(a) Doug. 671.

(b) 2 Sir W. Bl. 1190.

(c) Id. 1085.

(d) 1 Chitty on Pleading, *The Abbot of*

*Strata Marcella's case* 9 Co. 25.

(e) 1 Crom. Mee. & Rosc. 223; and 2 Dowl. Prac. Cas. 703.

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defendant might have raised the question whether the facts stated amounted to a privilege in point of law. That question cannot be raised now. On the face of the declaration it does not appear that the defendant was entitled to the money ordered to be paid into Court. It is not necessary to raise these objections by special demurrer, for the declaration is substantially defective. In *Hooker v. Nye* (a) a replication, intended to assert a special right in the plaintiff, was held bad on general demurrer, for not setting forth all the facts on which that right was to be founded. Again, the declaration is objectionable, because it does not appear that the plaintiff suffered any damage in consequence of the sheriff doing anything which he need not have done; as, for instance, it is not stated that there ever was a moment when the privilege of *Jeyes* ceased, and he could have been attached. As to the second ground on which damages are claimed, it is clear that that part of the plaintiff's demand is not maintainable. The plaintiff says that he incurred expense in opposing the discharge of *Jeyes*. If the arrest was wrong, he should not have opposed the discharge. By opposing it, he ratified what had been done in the arrest.

Kelly, in support of the declaration.—This is not an action of trespass, but on the case, and it is brought against a public officer for negligently performing his duty. It is, therefore, clearly maintainable, for the sheriff is bound to perform his duty in a careful manner. The statement on the record amounts to this, that the sheriff, at the time of the arrest, knew that *Jeyes* was privileged. The declaration is sufficiently precise to fix the defendant. It states a series of facts, and then alleges that the defendant, well knowing the premises, wrongfully caused *Jeyes* to be attached by his body. *Cameron v. Lightfoot* is hardly applicable to the present case. But *Stokes v. White* is a clear authority for the defendant. That was an action against the person who had innocently issued the process, and the Court there said, that if any person was liable the sheriff was the person. *Tarleton v. Fisher* which was referred to in *Stokes v. White*, shows that where there is any doubt as to trespass, case will lie. *Stokes v. White* is also an authority against the argument now put forward, that by resisting the discharge the plaintiff affirmed the arrest. Both Lord *Lyndhurst* and Mr. Baron *Parke* clearly expressed their opinion that the plaintiff could not be affected by the wrongful act of the sheriff. The real complaint here is, that, well knowing the fact, the sheriff wrongfully executed the writ of attachment, and the plaintiff is clearly entitled to all the damages he suffered in consequence of such wrongful act.

Lord DENMAN, C. J.—It clearly appears to me that this declaration is bad. The allegation that the party was privileged from arrest, has no meaning at all. It only amounts to this, that the person using the expression has something in his mind which he thinks amounted to a privilege enjoyed by the party attached by the sheriff. There is nothing more doubtful than the facts which constitute privilege. The facts under which the privilege in this case is supposed to have arisen, ought to have been set forth, that the Court might have judged whether the party was privileged or not. For want of such a statement of facts, there does not appear on the record any

(a) 1 *Crom. Mee.* & Ros. 258.

foundation at all for the action. The declaration also appears to me to be defective in not stating precisely what interest the plaintiff had in the money, and that the plaintiff had an interest in the detention of this party; for it is not sufficient to show that he was the person against whom the plaintiff had some claim in the Court of *Chancery*, and that he was in contempt. It should also have been shown that the attachment was the means by which the money ordered to be paid into Court would have found its way into the pocket of the plaintiff. There are other objections to the declaration, but on these which I have noticed, it appears to me that there is an absence of any substantive statement of a cause of action, and that the judgment must, therefore, be for the defendant.

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LITTLEDALE, J.—I think that this declaration is bad upon general demurrer, in not stating what the privilege of *Jeyes* was. There is an infinite variety of ways in which he might be privileged, and there are many cases in which the privilege might be doubtful. The declaration ought to have stated the way in which the supposed privilege existed, in order that we might see whether the party was entitled to it or not, and in what respect the sheriff had acted wrongfully. That ought to appear clearly, for it is a duty cast on the sheriff to execute all writs directed to him, and the plaintiff should show precisely in what way the sheriff has neglected that duty. It is not clearly shown that there was any distinct cause of action arising to the plaintiff from the conduct of the sheriff.

PATTESON, J.—I am also of opinion that the declaration is bad, for the reasons already given. The sheriff had a right to expect the plaintiff to put upon the declaration a statement of what the privilege was, for the party might have had a right, notwithstanding the discharge, to get all the benefit of the attachment. The present defendant had also a right to have placed upon the record the nature of the privilege, in order that he might traverse such facts as were alleged to constitute it, or take the opinion of the Court whether, under the facts stated, any such privilege existed. For these reasons I think the declaration bad. I do not say that it is not bad for other reasons. The action itself is *prima impressionis*, and I doubt very much whether any such action as this will lie at all.

WILLIAMS, J.—I am of the same opinion. It was *prima facie* the duty of the sheriff to take the party, and the plaintiff, in order to charge the sheriff with negligence in the execution of that duty, was bound to show the nature of the privilege which the party had, that would prevent the ordinary duty of the sheriff from attaching with respect to him; nothing of that sort appears on the face of this declaration.

Judgment for the defendant.

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A lease contained a general covenant to repair, and also a special covenant by which the landlord was empowered to enter and view the premises, and to give notice of repairs, and if the repairs were not made within a certain time, to enter and perform them, and charge the tenant with the expenses, and distrain for them as for rent. The lease contained a general covenant for re-entry in case of the non-performance of any preceding covenant as to rent, repairs, &c. The landlord gave notice of repairs, they were not made—he then gave notice, under the special covenant, that if not made within a certain time, he should enter and make them, and charge the tenant with the expenses. The tenant did not repair, and the landlord afterwards brought ejectment under the general covenant of re-entry:—*Held*, that he had, by the notice under the special covenant, waived his right of re-entry under the general covenant, as upon a forfeiture for non-repair.

EJECTMENT as upon a forfeiture for a covenant broken.—The cause was tried before Mr. Justice *Williams* at *Carmarthen*, when a verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit. The day of the demise in the declaration was the 18th of *November*, 1831. The lease contained, amongst other covenants, a covenant to repair and to yield up in repair; and it was also covenanted that it might be lawful for the lessor, his heirs or assigns, &c. with workmen or without, at all seasonable times during the continuance of the demise, to enter and come into and upon the demised premises, &c. to view, search, and see the state and condition thereof, and upon every such entry, if he or they should think fit, to give or leave notice in writing at the premises, &c. of all defects and want of reparation then and there found, and in case the lessee, &c. should within two months after such notice neglect or refuse to repair, it should and might be lawful for the lessor, &c. to enter upon the premises and do such repairs as he should think necessary to be done, and that the lessee, &c. should and would repay the lessor, &c. so much money as should be expended by him for work and materials in doing such repairs, at the time when the next half year's rent should become due, after such money should have been so laid out and expended, with a power of distress in case of neglect or refusal to pay, as in case of rent in arrear. The indenture also contained a general clause of re-entry in case of the non-performance of any of the covenants by the lessee. Two notices were given to the defendant. The first was dated 10th *July*, 1830, and was given by the agent of the lessors of the plaintiff in the following terms:—"Take notice, that on the receipt of this notice you are required to fulfil all and every the covenants contained in your lease or leases granted to you of the messuage, tenement, and lands called *Murven House Farm*, and that in case of your neglecting in anywise so to do, all and every building, hedge, &c. will be put in covenanted order and repair for you, and you will be charged with the costs thereof, &c.; or should there be any further breach of covenant, that it will affect the existence of your lease or leases." Some negotiations took place between the parties, and on the 21st of *November*, 1830, another notice was given reciting the former and the non-compliance of the tenant with it, and requiring him "to repair the hedges, gates, and fences on the said premises on or before the 30th of *December* next, and the houses, offices, and other buildings, on or before the 31st of *May* next, and in the event of your neglecting to make such repairs at such respective periods," that the lessors would enter and make the repairs according to the proviso in the lease. The defendant objected at the trial that the special notice of *November*, 1830, gave the right to the lessor to enter upon the premises for the purpose of making the repairs, and would enable him to recover, by way of distress, from the defendant the expenses thereby incurred, but that it operated as a waiver of the forfeiture. A verdict was taken for the plaintiff, subject to this objection. Other objections were taken, and were afterwards argued, but the decision of the Court proceeded upon this question alone,

and to this question alone the report will therefore be confined. A rule having been obtained to enter a nonsuit,

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Wilson, Chilton, and James showed cause.—The objection here is, that the plaintiff proceeds under the general covenant for a forfeiture, after having given notice under the special covenant to repair. The notices do not amount to an election to proceed under one covenant, so as to bar the plaintiff from the right of proceeding upon the other. The covenants are cumulative, and independent of each other. The notice of the want of repair was necessary to give the plaintiff a title to do anything, but that notice does not affect the right of entry, which is general in its terms, "provided that if the lessee and his heirs do not keep all and each of the covenants hereinbefore contained, &c., then in each and all of the said cases it shall be lawful for the lessor to re-enter." The covenants are cumulative, according to the authority of *Wood v. Day* (a). In *Roe d. Goatley v. Paine* (b), there was a lease with a clause of re-entry, and there was also a general covenant on the part of the tenant to keep the premises in repair; and it was further stipulated by an independent covenant, that the tenant, within three months from notice being served upon him by the landlord, should repair all defects specified in the notice; and it was held that the landlord might within the three months bring an ejectment against the tenant for a breach of the general covenant to repair. That case is stronger than the present, for the ejectment here was not brought till after the notice to repair had expired, and the repairs remained unperformed. This case is not opposed to the rule in *Doe d. Morecraft v. Meux* (c), where in a lease similar to the present, and where the landlord had given a notice to repair, it was held that he could not bring ejectment until after the expiration of the three months mentioned in that notice, for that case shows that he might bring ejectment after the expiration of the notice. In that case Mr. Justice Bayley distinctly stated, that "the landlord had an option to proceed on either covenant." A distress may be admitted to be an absolute affirmance of a tenancy, yet in *Doe d. Flower v. Peck* (d), where a lease contained different covenants on the part of the lessee, and a proviso for re-entry on the breach of any of the covenants, and a covenant to insure was broken, the lessor distrained on the 30th of *September* for rent then due, and afterwards brought an ejectment on a demise of the 24th of *October*; and the Court held, that though the distress was an acknowledgment of the tenancy to the 30th of *September*, and a waiver of any forfeiture to that time, yet the lessor was entitled to recover in ejectment for the forfeiture incurred by the breach of covenant between the 30th of *September* and the 24th of *October*. In the present case the omission to repair, during the period stated in the notice, amounted to a forfeiture at the end of that notice, for which ejectment could then be maintained.

John Evans and *V. Williams*, in support of the rule.—This ejectment cannot be supported. The case of *Doe d. Morecraft v. Meux*, is an authority decisive on that point, for it was there distinctly held that the

(a) 7 Taunt. 646.

(b) 2 Camp. 520.

(c) 4 Barn. & Cress. 606.

(d) 1 Barn. & Ad. 428.

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notice to repair was a waiver of the forfeiture for non-repair. Here, too, there were negotiations after the notice, and the proceeding on a forfeiture being an enforcement of a strict right, cannot be permitted if the landlord has done any thing which is inconsistent with the strict enforcement of such a right. The notice to repair and the negotiations were so here.—[*Patteson, J.*—Where a right to enter upon a forfeiture has been suspended by agreement between the parties, the landlord may afterwards take advantage of it; *Doe d. Rankin v. Brindley (a).*].—But here the right to re-enter was more than suspended—it was abandoned. After the notice, the tenant had a right to say, “I shall not repair the premises, for my landlord will repair them, and I shall pay him the expense.” The notice led the tenant to neglect the repairs, which he had a right to believe would be executed by his landlord. The landlord bound himself by this notice to repair the premises, which he should have done, and for the expense thus incurred he might then have maintained an action against the tenant. He did not do so, and he now brings an ejectment for non-repairs which he himself occasioned by his own notice.

Lord DENMAN, C. J.—In this case it is not necessary to enter upon any question but one of those raised in argument, namely, the question of the waiver of the forfeiture. The clause under which the plaintiff seeks to obtain possession of the premises, is that which provides that upon a breach the lessor shall have the right to re-enter. The lessor here says, that the premises were not kept in repair, but then attached to the covenant to repair is a qualification by which the lessor is provided with a certain remedy; namely, he may give two months' notice to repair, and if the premises are not repaired, he may repair them and charge the expenses against the tenant, and may distrain for such expenses as for rent in arrear. Suppose that he takes that upon himself, it appears to me that that is a waiver of the forfeiture. Now the lessor in this case has taken this upon himself. On the 10th of *July*, 1830, the lessor, by a formal notice, called on the defendant to repair.—(His Lordship read the notice.)—So that here the landlord has said, “In case of your neglect to repair, I shall repair for you, and you will be charged with the expense of it.” This notice expired in *September*, 1830. No advantage was taken of it, but on the 21st of *November* in that year, this further notice was given—(His Lordship here read the second notice.)—This notice was to expire, as to the hedges, gates, and fences, on the 30th of *December*, and as to the houses and buildings on the 31st of *May*.—This, therefore, was an extending of the time within which the lessor gave the tenant leave to repair the premises, and was a distinct notice that if he did not repair them, the lessor would make the repairs, and would charge him with the expense. The tenant therefore was put in a situation in which he would otherwise not have been, and in which he never can be again, for he was not able to do what the lessor said he would do for the tenant, and in waiting for the lessor to do what he said he would, the repairs might become more and more necessary, and yet the tenant could not make them. It does not appear that the lessor told the tenant, within the time specified in the notice, that the lessor would not do the repairs. Nothing of that sort

(a) 4 Barn. & Ad. 84.

appears, unless at a much later period, when it was intimated to the tenant, that if he did not begin to do these repairs within three days, he should be held to have forfeited the lease. The lessor having thus waived the right he possessed, cannot now insist on the forfeiture on this short notice—he cannot take advantage of this covenant, for he has chosen to act upon the other, and to take the remedy into his own hands in a manner inconsistent with his taking advantage of the forfeiture. I am, therefore, of opinion that there has not been such a breach of the covenant as to entitle the plaintiff to enter as upon a forfeiture.

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LITLEDAL, J.—I am entirely of the same opinion. The landlord has, by acting on the latter part of the covenant, waived his right of re-entry. He has told the defendant that he will make the repairs, and might, therefore, be justified, under the provisions of the lease, in doing so; he would be authorized to make the repairs, and might make them more efficient than the tenant would have done. Whatever was reasonable in the discharge of the power thus reserved to the landlord, he would have had a right to charge against the tenant. Having that power, and having claimed to act under that power, he must be taken to have waived the forfeiture; his remedy is pointed out by the lease itself, and by insisting on his right to repair, and to charge the tenant with these repairs, and to distrain for them, he has given up the right of re-entry as for condition broken.

PATTERSON, J.—I entirely agree with the rest of the Court, as to the effect of this notice. The lessor of the plaintiff has waived his right to a forfeiture. On that ground the rule must be absolute. *Roe v. Paine* (a), is only a case to show that the covenant was independent, but there was the word “forthwith” in that case, and that was relied on in the judgment. In *Doe d. Maus* (b), Mr. Justice Bayley did not say that there was a waiver of the forfeiture, but Mr. Justice Holroyd said that there was; but that case goes further than the present. In *Doe d. Rankin v. Brindley* (c), the ejectment had been brought before the time, but after that the landlord accepted rent. He did so on the 25th of March, but there was again a forfeiture after that, and that forfeiture was not waived; and then another ejectment was brought for not repairing within three calendar months, and the Court said that the ejectment would lie on this forfeiture, and refused a rule to show cause why the verdict for the plaintiff should not be set aside. In this case the time was not enlarged for the benefit of the defendant, but the lessor says, “I have a right to take advantage of the covenant in the lease by which you are bound to put the premises into repair within two months after notice, and I am at liberty to enter, and to put them into repair, and to charge you with the expense, and you must pay me this expense at the same time as the next half year's rent, and if you do not, I may distrain for the expense as for the rent.” When the landlord says in this manner that he will repair, the tenant says, “well, I will let you do so.” The relation of landlord and tenant, so far from being put an end to by this notice, is affirmed by it, and the landlord puts the tenant into a totally different situation from that in which he would

(a) 2 Camp. 520.
(b) 4 Barn. & Cress. 606.

(c) 4 Barn. & Ad. 84.

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have stood had no such notice been given. I say nothing of the other points—this one is sufficient to decide the case.

WILLIAMS, J.—I am entirely of the same opinion. Under the provisions of this particular lease, the landlord by his notice takes advantage of one of two remedies, which are, to a certain degree, inconsistent with each other. The remedy by the power of entering upon the premises and repairing and indemnifying himself for the expense by distress, had the necessary and natural effect of suspending all repairs on the part of the tenant, and if, after availing himself of this power, the landlord might treat the tenant's omission to repair as a forfeiture, he would be proceeding against the terms of the lease, and taking advantage, by way of forfeiture, of a negligence which his own notice might have occasioned. The landlord cannot have recourse to both these inconsistent remedies.

Rule for a nonsuit absolute.

The Rev. JOHN VERE ALSTON, Clerk, *v.* BENJAMIN ATLAY.

Where the holder of a living has rendered that living voidable by the acceptance of another, but no proceeding has been taken to avoid it, the right of presentation will pass to a purchaser by the conveyance of the advowson, and such purchaser may at once avoid the living, and present his own clerk.

DEBT, on the 2 & 3 *Edw.* 6, c. 13, for not setting out tithes:—*Plea*, (before the new Rules) the general issue. The plaintiff was the rector of *Cowsby*, in the county of *York*; the defendant was a farmer in the same parish. The cause was tried before Mr. Baron *Parke* at *York*, in the Spring Assizes, 1835, when a verdict was found for the plaintiff, for the sum of 6*l.*, being treble the value of the tithes, subject to the opinion of the Court on the following case:—The rectory of *Cowsby* is a benefice under the value of eight pounds in the King's books, and the plaintiff was instituted and inducted into it in the year 1816, and duly subscribed and read the articles. For many years after the plaintiff became the rector of *Cowsby* as aforesaid, the defendant, who was a farmer there, regularly paid his tithe to the plaintiff, as the rector, and continued to do so down to *Michaelmas*, 1832. The defendant did not pay the tithe to the plaintiff claimed by him in the year 1833, nor did he set out the same, although the defendant had received due notice on behalf of the plaintiff to set out his tithe in kind, but the defendant did not pay the said tithe, or set it out, in consequence of the same being claimed by the Rev. *George Wray*, and the defendant carried away his crops during the year 1833 without setting out his tithes, which were of the value of two pounds, and there being no composition or agreement with the plaintiff for the tithe. In 1829, the plaintiff was instituted and inducted into the rectory of *Odell*, in the county of *Bedford*, being distant one hundred miles from the first-mentioned rectory, upon the presentation of his brother, and subscribed and read the articles. *Odell* is a benefice with cure of souls, of higher value than eight pounds in the King's books. In 1831, *Justinian Alston*, Esq., the brother of the plaintiff, who was owner of the manor of *Cowsby*, and of an estate there, and patron of the rectory of *Cowsby*, sold the manor and estate, and the advowson, right of patronage, and presentation of and to the rectory or parish church of *Cowsby*, to *George Lloyd*, Esq., and the same were conveyed to him by indentures, bearing date the 27th and 28th of *November*, 1831. In the year 1832, Mr. *Lloyd* then thinking that

the rectory of *Cowsby* had become voidable in consequence of the acceptance by the plaintiff of the rectory of *Odell*, and that he, Mr. *Lloyd*, had a right to present a clerk to the rectory of *Cowsby*, presented the Rev. *George Wray* to such rectory, and in pursuance of such presentation the said *George Wray* was instituted and inducted into such rectory, and read and subscribed the articles; but it is contended on the part of the plaintiff, that such presentation, institution, and induction, were merely formal, and of no effect. It was agreed that the parties should be at liberty to refer to the pleadings, and to copies of the indentures of the 27th and 28th of *November*, 1831, as if the same were part of the case. The question for the opinion of the Court was, whether the plaintiff, under the above circumstances, was entitled to maintain the action? If the Court should be of opinion that he was so entitled, then the verdict to stand, otherwise a nonsuit to be entered. And it was further agreed, that either party should be at liberty, with the consent of the Court, to turn the case into a special verdict.

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Wightman, for the plaintiff.—The acceptance of this second benefice is said merely to make the first benefice voidable, not void. But if it is voidable it cannot be sold, for voidable and void are for this purpose the same. On the other side it is contended that the living is void or voidable, at the option of the patron. That argument cannot be supported, for then it would be in the power of the patron to evade at his pleasure the laws against simony. In principle void and voidable must be considered the same thing. A voidable benefice is a *chose in action*, and cannot be sold. A grant of an advowson, after the church is actually vacant, is void, and the lapse occurs after induction to a second benefice; *Bishop of Lincoln v. Wolforstan* (a). The reason given for the judgment of the Court in that case is stated in *Blackstone's Reports* to be as well for the danger of simony as because the grant would be a grant of a *chose in action*. In like manner a right of entry upon a forfeiture cannot be assigned.—[*Patteson*, J.—How would that be in the case of a reversioner?—He would come in upon a previously existing right. The summary of *The Bishop of Lincoln v. Wolforstan*, as given in *Cruise's Digest* (b), is, “In a modern case the Court of King's Bench resolved, that a grant of a next presentation, or of an advowson, made after the church was actually fallen vacant, was a void grant *quoad* the fallen vacancy;” and in the report in *Burrow*, Lord Mansfield and Mr. Justice Wilmot say (c), “the reason is the public utility, and the better to guard against simony, not the fictitious reason of its being then become a *chose in action*.”—[*Patteson*, J.—The word ‘advowson’ is incorrectly used in that case. The presentation is not a part of the advowson. It was so held in *Rennell v. The Bishop of Lincoln* (d).] All the disadvantage which can be contemplated where the living is actually vacant, arises where it is voidable at the option of the patron, for the patron may instantly make it void by presenting his clerk. *Fox v. The Bishop of Chester* (e), will be relied upon by the other side. But there the House of Lords acted upon circumstances which showed that the question of void or voidable was not to be

(a) 3 Barr. 1504; 2 Wils. 174; and 1 Wm. Bl. 490.

(b) 3 Cruise Dig. 29.

(c) 3 Barr. 1512.

(d) 7 Barn. & Cress. 113.

(e) 1 Dow & Clark, 416; 3 Bligh, 123; 6 Bing. 1.

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decided by the patron, but by circumstances over which he had no control; and where these existed it was considered that the mischief was not so likely to arise. This is a vacancy by cession (a), and though the patron might have presented, he cannot sell. In this case he has not presented, and as between the parson and the farmer the church is full, and the farmer is liable for his tithes.

*Tomlinson, contra.*—There is no decision which touches the present case. In all the cases the expression 'voidable' is improperly used as if bearing the same sense as void. There is a great distinction between the two things. The patron is bound to take notice of the act of the clerk, and if such act affects the benefice so as to make it vacant, he must present within six months, or a lapse will occur; *Winchcombe v. The Bishop of Winchester* (b). There is no dispensation in this case, and the right to present does not depend upon the statute, for the living is below eight pounds, and the right, therefore, depends on the canons, so far as they have been recognized in our law. The cases show that where one living is under eight pounds, an acceptance of another does not avoid the first till some act be done by the patron. It is only void at his election; *Armiger v. Holland* (c), *Digby's case* (d), *Shute v. Higden* (e), *Watson's Clergyman's Law* (f), and *Gibson's Codex* (g). In *Halton v. Cove* (h), all these authorities are cited and recognized, and in that case circumstances like the present were held not to constitute an actual vacancy. The only authority cited on the other side, as seeming to bear out the proposition contended for by the plaintiff, is *The Bishop of Lincoln v. Welforstan*. *Rennell v. The Bishop of Lincoln* has also been mentioned. Neither of these is in point. In the first the living was above eight pounds a year, and in the other the living was actually vacant. It is admitted that there would have been a continuing right in *Alston* if he had not sold. Suppose, then, that he had died, would his heir or his executor have had the right to present? In *Mirchouse v. Rennell* (i), the name under which the case of *Rennell v. The Bishop of Lincoln* was decided in the House of Lords, it was held by that House, that, as the living was actually vacant before the death of the prebendary, the right of presentation passed to his heir, but the strongest disinclination was expressed by their Lordships against giving such a right to the personal representation, and it would not have been given to him if the living had been merely voidable, and not void. If the patron here had died, and devised the advowson, the right of presentation would undoubtedly have passed to the devisee. Yet in law the devisee is as strictly a purchaser as he who purchases the estate for money. The mere fact of the payment of the money cannot make all the difference in the rights of the parties. There is nothing here to show a simoniacal contract. The whole objection rests on the ground of tendency. That ground was repudiated in *Fox v. The Bishop of Chester*, when before the House of Lords (k), and the judgment of their Lordships proceeded on the

(a) Fitz. N. B. 80, L.

(b) Hob. 165.

(c) Moore, 542, and Godbolt, pl. 33; 2 Roll. Abr. Presentment, L.

(d) 4 Rep. 78 b.

(e) Sir T. Jones, 18.

(f) Ch. 2, p. 5.

(g) 945, 946.

(h) 1 Barn. &amp; Ad. 538.

(i) 1 Clark &amp; F. 527.

(k) 1 Dow &amp; Clark 416; 3 Bl. N. S. 123; and 6 Bing. 1.

distinction between a living actually vacant, and one which might become so.—[*Patteson, J.*—Is there any case deciding what would be the effect of the Bishop calling on the patron to present to a voidable living?]*—There is none.*—[*Patteson, J.*—Can the Bishop of his own right compel the patron to present, or must he take proceedings in his own court?]*—He must proceed in Court, and will, at the expiration of six months afterwards, be entitled to present by lapse.*—[*Littledale, J.*—In *Bro. Abrid. Quare Impedit.* and *Bro. Abrid. Presentation a l'Eglise*, it is said that the Bishop may give notice to the patron to present, and if he does not present within six months, the Bishop may present by lapse.] The late patron cannot present, he has parted with the advowson; if the right is not in the present patron, the time may run out, and the Bishop would then have the right to present, as upon a default of the patron, when in truth there had been no default.—[*Patteson, J.*—In *Bro. Abrid. Presentation*, it is said, that if the incumbent of one living procure another of the value of five pounds, which is neither within the statute of *Hen. 8*, nor the statute of *Eliz.*, though that would not be an avoidance of the living before notice to the patron, yet it shall lapse after six months' notice; so that it seems by that authority that the Bishop might present without deprivation.]—That case goes further than the authorities already cited, but it does not affect the present. Here the living was not void, and the right to present passed to the purchaser of the advowson.

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*Wightman*, in reply.—Nothing said on the other side meets the objection that the patron cannot sell a void turn. For the purposes of the law against simony there is no distinction between a voidable and a void turn. The question as to the heir and executor does not arise here. Though the advowson passed, the right to present for this term did not pass. The creditors of a bankrupt may sell the advowson, but if the church is void at the time of the sale, the vendor shall not present, but the bankrupt himself, for the void turn is not saleable; *Gibson's Codex* (a). The same principle is adopted in *Leake v. The Bishop of Coventry* (b), *Walker v. Hammersley* (c).

**LORD DENMAN, C. J.**—The question here is, whether the defendant was justified in not setting out the tithes for the plaintiff by reason that he had ceased to be the rector, and that they were claimed by a new incumbent, who had been presented by Mr. *Lloyd*, the purchaser of the advowson. It appeared that the rectory of *Cowsby* was under the value of eight pounds in the King's books, and that after presentation, institution, and induction to the rectory of *Cowsby*, and before the sale of the advowson to Mr. *Lloyd*, the plaintiff had accepted, and had been instituted and inducted to another living, with the cure of souls, such second benefice being rated at above eight pounds a year in the King's books. Now it is not contended that by the acceptance of the second living the first became *ipso facto* void, but that although not within the act *Hen. 8*, c. 13, s. 9, yet that by common law, which in this matter has adopted the provisions of the Council of Lateran, the first living was vacant by the acceptance of the second, so that the patron might have presented, and that, therefore, it was opposed to the policy of the law against simony to allow the patron, whilst the living was in that state,

(a) 174.

(b) Cro. Eliz. 811.

(c) Skin. 90.

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to sell the advowson, so as to pass with it the next presentation. Now, in order to hold, for the reasons urged in the arguments for the plaintiff, that this sale was void *quoad* the next presentation, it appears to me that we must be prepared, not to declare but to make the law, and we should not be justified in so doing. There is no case which goes the length of saying that this first living has become void, on the ground of the mere acceptance of the second, and we ought not to give such an effect to any principle of law, unless we find that the authorities fully justify us in so doing.

LITLEDAL, J.—I am entirely of the same opinion. The rectory of *Cowsby*, it is found, is under the value of eight pounds in the King's books, and the plaintiff was instituted and inducted in the year 1816. In 1829, the plaintiff was instituted and inducted in the rectory of *Odell*, which is a benefice with the cure of souls, 100 miles distant from the first living, and which is rated at above the value of eight pounds a year. This is not a case within the statute, for that only applies to cases where the first living is of the value of eight pounds and upwards in the King's books. By the common law the acceptance of another benefice did not render the first benefice void in the hands of the incumbent. But by the Council of Lateran it was decreed, that the acceptance of a second living should be sufficient to make void the enjoyment of the first, and this ecclesiastical law was introduced into the general law of England, and is now taken to be such. By the common law, which must prevail over the ecclesiastical law, except when special provision has been made, this living became voidable, and the patron might have presented a new incumbent, and the living upon such presentation would have become void; or the patron might, by the ecclesiastical law, have been required to present, and if he neglected to do so within six months the Bishop would have a right to present by lapse. This has not been done in the present case, and it is said, that as the original owner of the advowson has not been thus called on, the plaintiff is still entitled to receive the tithes, for that till presentation of another person the church is full. So it would have remained if the same person had continued patron of the living, but in 1831 the patron sold them to another person, and the question is, whether this conveyance carried with it to the vendee the right of presentation? or, whether that right remained in the original patron? or, whether neither of them had it, but the Bishop took it after a lapse of six months? If the first living was void, the presentation would go to the Bishop on account of the lapse, but it was only voidable, and the original patron determined to treat it as beneficial for himself that the first incumbent should remain. The living, therefore, is not void; but it is said that being voidable is a great danger, against which it was intended to guard in the law of simony; and that to say that a right of presentation under such circumstances will pass to the purchaser of an advowson, will be to defeat the laws against simony. I do not see that our decision in the present case can have any such effect. It appears to me that the church being voidable only, the right of presentation did pass, though, if the living had been void, it would not, the right of the presentation for that turn being then no longer part of the advowson. The right of presentation to a living not void at the time, would go along with the advowson to a purchaser, who would stand in the same situation as the original owner of the advowson. If the original

owner would have had the right to declare the living vacant, the purchaser standing in the same situation would have the same right. Mr. Lloyd here has used that right, he has presented a person who has a perfectly good title as incumbent of the living, and the right of the plaintiff to claim these tithes is now at an end. Judgment must be for the defendant.

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PATTESON, J.—I also think that judgment must be given for the defendant. At the time when the sale of the advowson took place the church was voidable only, and not void. If it had been void, the conveyance of the advowson would not have passed the right of presentation to the vacant living, and all the authorities cited by Mr. Wightman only go to this extent, that if the living had been void, the right of it would have been disannexed, and would no longer have formed parcel of the advowson. That is the principle of the case of *Mirchouse v. Rennell*, in the House of Lords. I am not prepared to say, that the objection as to simony would not form part of the reason why that right of presentation would not pass by the conveyance of the advowson, and also because it would be a *chose in action*. But the objection as to a *chose in action* does not apply to a voidable living, for until presentment or deprivation the then incumbent still continues to hold the living. The sale and conveyance of the advowson must pass every thing that is appended to, or forms part of, the advowson at the time of the sale. It has not been contended that if the incumbent had died the vendee would not have been entitled to present, but it is very difficult to see why he should not have the same title under the present circumstances. The difficulties which present themselves, if we were to hold that he was not entitled to present, are without number. The Bishop, according to the authorities cited, might, in a case like this, deprive the party by sentence, or, by giving notice to the patron, might present by lapse, if the patron did not present within six months from that notice. I will not stop to inquire whether these authorities are sufficient for the purpose for which they are cited, but in either mode of proceeding the Bishop is obliged to give notice to the patron. Who, then, in this case is the patron to whom the Bishop is to give notice? For some purposes it is admitted that the vendee is patron. Then why not for all? The vendor, after sale and conveyance, is no patron at all. Unless, therefore, it can be said that this case was open to objection on the ground of simony, the right of presentation passed by the conveyance to the purchaser. Then, how is the objection of simony made out? In the case of *Walker v. Hammersley*, which has been cited from *Skinner*, the *quare impedit* was to recover the very presentation which was void. If the word 'advowson' is to be taken in its large sense, as used there, that case is not law. It must mean the presentation to the vacant living. Then that case does not apply to the present. So in the case of the assignees of a bankrupt, if the living was vacant before the party became a bankrupt, the assignees could not sell the right to the next presentation, nor could they present to it. The reason why assignees of a bankrupt cannot present in such a case is, that they take nothing but what is of money's worth and value, and the presentation to a vacant living is not of money value in law. This reason shows that the case of assignees is as an argument worth nothing in a case of this kind. The presentation is no part of the estate and effects of the bankrupt. It is not valuable in a pecuniary point of view; it is a mere right or trust, and was so



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declared in this Court in *Rennell v. The Bishop of Lincoln*. Whether a voidable turn will pass to assignees or not, is another thing. There is no doubt, according to our decision, that as such a turn might be the subject-matter of sale, it would pass to them. We are not able to avoid that. By the law of the land an advowson is saleable, and I do not see why all that is incident to it should not pass with it. In the case of *Halton v. Cove* (a), "vacation" was taken to mean actual vacation. It is a singular thing in that case, but there one moiety of the advowson did actually pass after the living became vacant. In that case some observations were used which, without a knowledge of the words of the acts of parliament, might tend to mislead. It was said that the first living was, on presentment to the other, void *ipso jure*. Those are the words of the Council of Lateran, but they are not *ipso facto*. The two things must be treated as distinct. I see so much mischief in extending to one case the principle applicable to the other, that I think we must hold that, unless the living is actually void, the conveyance will pass the advowson with all its incidents to the purchaser, and he may, by his own act, make the living void, and so get the presentation. The effect of this may be what has been described, but we cannot prevent that.

WILLIAMS, J.—I am also of opinion that judgment must be for the defendant. It is said that void and voidable are, for the purposes of the acts against simony, the same thing in fact, for that the patron may at once make the living void, and so get the presentation. There is not any case going the length of holding that, because the mischief is the same, the law is the same, and that the Court is to give effect to the provisions of a statute upon a case which is not within them; *Fox v. The Bishop of Chester* is a strong authority to the contrary. In that case this Court had acted upon that doctrine, but the House of Lords declared that an analogy of this sort was insufficient and unsound, and so reversed the decision.

Judgment for the defendant.

(a) 1 Barn. & Ad. 538.

### TOMLIN v. The Mayor and Corporation of FORDWICH.

Two arbitrators were empowered to decide, among other matters, on what terms a building lease held by an individual under a corporation should be renewed. The arbitrators awarded that the corporation should put the premises in "good tenantable repair, &c. to the satisfaction of J. M., of S., in the county of K., builder."—Held, that this reference of the repairs to the judgment of a third person was not within the authority of the arbitrators, and made the award bad.

COVENANT.—The declaration stated the defendants' interest to certain garden grounds and buildings within the liberties of *Fordwich*, and their demise of the premises to one *Theodore Sydenham*, for the term of ninety-nine years; that he built a house on part of the land so demised, and converted the residue into garden ground, to be used with the house; that the residue of the term became vested in one *Anthony Jennings* the elder, who purchased a small piece of freehold land adjoining to the piece demised, and inclosed it therewith, and it formed a part of the garden; and that this demise and premises became and were vested in the plaintiff at the time when the lease expired, namely, the 11th of *October*, 1833, and the plaintiff

Held, that this reference of the repairs to the judgment of a third person was not within the authority of the arbitrators, and made the award bad.

was also seised of the said freehold piece of ground; and that at the expiration of the lease certain questions and differences arose between the plaintiff and the defendants touching the renewal of the lease, and terms of such renewal, and touching the boundaries between the freehold and leasehold lands; and that on the 15th of *December*, 1834, certain articles of agreement were entered into between the defendants, under their seal, of the one part, and the plaintiff of the other part, (which said articles of agreement being in the possession of the said defendants, the plaintiff cannot produce the same to the Court here,) and which after reciting that at a Court holden for the said town at the Guildhall there, on the 14th day of *January* then last past, it was ordered that a lease of the said house and garden belonging to the corporation, and in the occupation of the said plaintiff, should be offered to him for the term of thirty years, to commence from the 11th day of *October* then last, at such rate and upon such other terms and conditions as should be named by two indifferent persons, one to be named by the said defendants, and the other by the said plaintiff, with power for those two to name a third person in case of difference; and that it was further ordered that arbitration bonds should be executed by the parties to effect the above arrangement; also that the question of boundary between the defendants and the plaintiff should be determined by the arbitrators; and also reciting that the plaintiff was willing to accept of a lease of the said messuage or tenement, garden, and premises belonging to the defendants, for the said term of thirty years, and to accede to the terms of the said therein recited order in other respects, so that all questions and differences between the defendants and the plaintiff in the premises might be determined and ended:—It was then witnessed that the defendants covenanted for themselves and their successors, and the plaintiff for himself, his heirs and executors, that the several questions and differences between the said parties, relating to or concerning the matters aforesaid, should be referred and submitted to the judgment, award, arbitrament, final end, and determination of *Stephen Elgar* and *George Moss*, with power to appoint an umpire. It was further covenanted, that the parties should abide by the award when made, or pay the sum of 500*l.*, by way of liquidated or stipulated damages. The declaration then averred, that on the 9th day of *September*, in the said year of our Lord 1834, the said *Stephen Elgar* and *George Moss*, having heard, examined, and duly considered the allegations and proofs of the said parties respectively, did duly make and publish their award in writing, under their respective hands, of and concerning the matters to them referred, ready to be delivered to the said parties, or to such of them as should desire or request the same, and thereby the said *Stephen Elgar* and *George Moss* did, amongst other things, award, adjudge, and determine, that the defendants should, within the space of two calendar months then next ensuing, at their own costs and charges, put and place the aforesaid messuage or tenement, with the outhouses and appurtenances thereunto belonging, the property of the said defendants, in good and tenantable order, repair, and condition, to the satisfaction of *James Moys*, of *Sturry*, in the county of *Kent*, builder; and they awarded that a lease should be executed at a certain rent, and containing the usual covenants, among others, that the plaintiff should keep the premises in repair, the same having been first put in repair as aforesaid. It was then averred, that the

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defendants would not, within two months after the award, put the house into good and tenantable repair, to the satisfaction of *James Moyo*, of *Sturry*, and that they refused to execute a lease to the plaintiff, by means whereof they had become liable to pay the plaintiff the sum of 500*l.* as liquidated damages. *Breach*.—Non-payment of that sum.

*General Demurrer* to the declaration, and joinder in demurrer.

*Platt*, in support of the demurrer.—Instead of directing the terms on which the lease should be granted, the arbitrators have exceeded their authority by going into other matters. They have not made a final award. They have directed the repairs to be done to the satisfaction of a third person, and they have said nothing of the boundaries expressly referred to their arbitration. The award is bad on two grounds; first, that the arbitrators had no right to direct repairs; secondly, that they had no right to delegate to another person the power entrusted to them. The award would be void if the arbitrators had exceeded their authority in any one point; here they have exceeded it, or neglected it altogether. It would also be absolutely bad if the arbitrators had decided only on the granting of the lease, the question of the boundaries having likewise been submitted to their decision. In *Comyns's Digest* (a), it is said, "If a submission be *ita quod fiat de præmissis* the award shall be of all matters in controversy of which they have knowledge, otherwise it will be void." And again, "If there be a submission of such and such things specially named *ita quod*, &c., an award not made of all is void, for they ought to take notice of them, being specially named in the submission." It is incumbent on the other side to show that the arbitrators exercised their authority on the question of boundaries. There is no allegation in the declaration that they did so. Lastly, it does not appear by the declaration that the articles of agreement were under the seal of the plaintiff. They are stated to have been under the seal of the defendants, but not under the seal of the plaintiff, so that he does not appear to have entered into any equal covenant with them. There is, therefore, no mutuality of submission.

*Hayes*, in support of the declaration. The last objection has no force. The defendants are a corporation, and could not bind themselves in any manner but by seal; the plaintiff is a private individual, and was not obliged to seal an ordinary agreement. His liability sufficiently appears on the face of the declaration.—[*Patteson*, J.—You say that in an agreement with a corporation, one party is bound by deed, the other by simple contract.]—It is so. There is no law to show that where in a contract with a private individual a corporation binds itself by deed, the individual contracting with the corporation must necessarily do the same. As to the repairs, it is clear on the general terms of this submission, that the arbitrators must have understood that they had authority to direct repairs. In the first place, the lease under which the plaintiff held was a building lease, and one of the first terms of settlement must be the repairs.—[*Lord Denman*, C. J.—It is likely that the repairs would be referred, but were they so?—They were in substance referred by the reference of the "terms and conditions" on which the lease should be renewed, for these, taken in relation to a lease of

(a) Tit. Arbitrement, (E 4.)

this sort, must necessarily include repairs. The arbitrators could not exercise the power which it is admitted they possess, of directing the terms on which the lease should be granted, part of which relates to keeping the premises in repair, without in the first instance considering whether or not they were first to be put into a fit state of repair. This is clear from the nature of the reference, the situation of the parties, and the language used. Then, as to the reference made by the arbitrators to the opinion of a third party. It is clear that they had a right to the assistance of a third person, if, in the discharge of their duty, they came to decide upon a fact which they could not determine by their own personal skill and knowledge<sup>(a)</sup>. The arbitrators did not give him a general discretionary power, but specified the manner in which the repairs should be performed, and merely directed the builder to see that the repairs were such as they had intended. —[Lord Denman, C. J.—The award would have been good had it directed that the repairs should be done to the satisfaction of the arbitrators, but it directed that they should be done to the satisfaction of Mr. Moys.]—The direction is not generally that the repairs shall be done to his satisfaction, but his satisfaction is limited and restrained by the directions which the arbitrators have before given. But even if bad as to this part, the rest of the award being final may stand; *Manser v. Heaver* (b).—[Littledale, J.—If the arbitrators may direct one thing to be done to the satisfaction of one person, they may direct twenty things to be done to the satisfaction of twenty different persons.]—If the arbitrators here had left out any reference to a third person, it would have been a question for a jury whether the repairs ordered were good and tenantable. To avoid that inconvenience this special reference to him was inserted. But it may be rejected, and then it will stand as a general award to put the premises into tenantable repair. The plaintiff is not bound to show that the arbitrators exercised a discretion on the question of boundaries. He is not bound to set out on the face of his declaration more than is sufficient to maintain the cause of action there stated. He has done so here.

LORD DENMAN, C. J.—This reference to the opinion of a third person is clearly an insuperable objection to this award. It is impossible to detach one part of the sentence from the other, and to say that one part may be rejected and the rest retained. The arbitrators have directed something to be done which shall be satisfactory to the judgment of a third party. This makes the award bad in a material part. The whole, therefore, is bad.

LITTEDALE, J.—Without entering into the other parts of the case, I am clearly of opinion that this award is bad. The reference to the judgment of a third party cannot here be rejected; it is of the essence of the award. If the award had contained, as supposed, a general direction, it would perhaps have been a question for a jury, whether the repairs, when done, were done according to that direction, but that objection does not render the reference to the judgment of a third party proper.

PATTESON, J.—This case is distinguishable from that of *Manser v. Heaver*.

(a) *Anderson v. Wallace*, 3 Clark & F. 26.

(b) 3 Barn. & Ad. 295.


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The direction there was, that the bed of a river should be cleansed, and the arbitrator reserved to himself the right of afterwards declaring, if called upon by either party, whether what he had directed to be done was done to his satisfaction. That reservation was to his opinion, but still it made the award not final, and therefore so far bad; but there the objectionable part of the award was clearly separable from the rest; here the different parts could not be separated.

WILLIAMS, J.—The argument of the plaintiff is most strong against himself. If the repairs were, as contended, to be made part of the terms on which the lease was to be granted, the award should have been final as to those repairs before directing the lease to be granted, and at all events the argument shows that this reference as to the repairs cannot be separated from the rest of the award.

Judgment for the defendants.

### DOE *d.* WILLIAMS *v.* SMITH.

A tenant entered certain premises in May, but was to pay rent as from the 2d of February preceding, to the 2d of February in the next year, after which he was to hold them as a tenant from year to year. In October, 1833, he received a notice to quit "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said messuage, &c. shall expire, after the expiration of half a year from the delivery of this notice."—*Held*, that the word "present" must have reference to the expiration of the year current after the time stated in the notice, or might be rejected altogether, and that the notice was a good notice for February, 1835.

**EJECTMENT** on a demise laid on the 4th of February, 1835.—*Plea*, not guilty.—At the trial before Bolland, B. at the Spring Assizes in 1835, for the county of Denbigh, it appeared that the defendant had entered in May, 1832, to pay rent to the 2d of February following, and then from year to year. The following notice to quit was put in:—

"To Mr. Francis Smith.—Take notice that you are to quit and deliver up to me, the undersigned Henry Owen Ayrane, the possession of all that messuage, &c. at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said messuage, &c. shall expire, after the expiration of half a year from the delivery of this notice, whereof you have this notice the 21st of October, 1833."

It was objected that this was not a sufficient notice, either to determine the tenancy in February, 1834, at which time half a year would not have expired after the delivery of the notice, or in February, 1835, which would not be the time when the tenant's "present year's holding" would expire. By the learned Judge's direction a verdict was found for the lessor of the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit. A rule having accordingly been obtained,

John Jervis showed cause.—This notice is sufficient. The rule of construction as to notices of this kind is, that the Court will effectuate the intention of the parties. The intention of the landlord here was to call on the tenant to quit at the expiration of the notice. If the notice could not by possibility expire in February, 1834, it would expire in February, 1835, and so it shall be construed as a notice to quit given for any six months at the end of which the tenancy would expire. To effectuate this intention the Court will reject the word "present;" *Doe d. Bedford v. Kightley (a)*. A notice dated on the 27th of September, and served on the 28th, requiring

a tenant to quit "at *Lady-day* next, or at the end of his current quarter," has been held not to be a notice for two separate days, but a proper six months' notice; *Doe d. Lord Huntingtower v. Culliford (a)*. That is a distinct authority in favour of the present notice.

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*R. V. Richards*, in support of the rule.—This notice is not sufficient to determine the tenancy. It is too late to expire in *February*, 1834; it might have done for the *May* holding, but will not do for *February*, and it is restricted to 1834 by the words "present year's holding." The question is, what is the meaning to be obtained from the notice?—[Lord *Denman*, C. J.—That is the result of the cases.]—Then it is clear that the tenant could not infer any thing but that the holding meant was that ending in *February*, 1834. But, as that holding expired earlier than six months from the time of the date of the notice, it was clear that he could not be obliged to act upon it at that time. He, therefore, naturally considered that the notice was altogether irregular, and that a fresh notice must be given. This is the inference which any one must draw from it. The tenant was consequently misled by the notice. On the principle stated, therefore, it is clear that the notice was bad.

Lord DENMAN, C. J.—It appears to me that this notice is well enough. It is admitted that it would do for *May*, if the commencement of the tenancy had been from that time. If it would do for *May*, why not for any subsequent period at which the tenancy would expire? Although bad for the then next *February*, 1834, yet it is good for the succeeding *February*, and the word "present" must be taken to be referable to the then present year after the expiration of six months from the date of the notice. There is nothing in the notice to mislead the tenant.

LITTLEDALE, J.—The document is not very clear, but still the question is, whether it is not sufficiently so to explain the intention of the landlord, and make it intelligible to the tenant. The original taking was in *May*, 1832, to expire in *February*, 1833; the defendant was then to be considered as tenant from year to year from that time. The notice to quit was given in *October*, 1833, and if for the *February* immediately following, it would not be sufficient; but then the notice goes on, "or such time as your present year's holding shall expire, after the expiration of half a year from the delivery of this notice." That would evidently take it beyond *February*, 1834, and what is the time after the expiration of half a year of that notice, at which the holding would expire? Why *February*, 1835. Therefore the words "present year, after the expiration of half a year," must have reference to the expiration of the year current after that time, or the word "present" should be rejected altogether. If that is rejected, all the latter part is clear enough, and the tenant must have known when he ought to quit.

PATTERSON, J.—I am of the same opinion. We must not construe these notices with the same strictness as a plea or a replication.

WILLIAMS, J. concurred.

Rule discharged.

(a) 4 Dowl. & Ry. 249.

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## BENMORE v. NECK.

The omission from a plea of the *actio non*, and prayer of judgment, is no ground of demurrer where a plea goes to the commencement of the action, whether it is pleaded to a part or the whole of the declaration.

Where to an action of assault and battery, the defendant pleads a conviction and certificate under the 9 Geo. 4, c. 31, ss. 27, 28, he must state the names of the justices before whom the proceedings under that statute occurred.

**TRESPASS** for assault and battery.—*Plea*, to a part of the trespasses, not guilty, and to the residue, a certificate under the statute 9 Geo. 4, c. 31, ss. 27, 28, the act relating to common assaults. The plea left blanks for the names of the justices who adjudicated upon the question; and it also omitted the *actio non*, and the prayer for judgment. *Demurrer*, assigning these for causes. The Court called on

*Tyndale* to support the plea. He said, that the gist of the allegation was, that a proper authority had adjudicated on the subject-matter, and that the names of the justices were immaterial; and he cited *Draper v. Garratt* (a), and *Perreau v. Bevan* (b).

*Per Cur.*—The omission of the *actio non* and prayer of judgment was no ground of demurrer in any case where the plea went to the commencement of the action, whether it was pleaded as to part or the whole of the declaration. It was only necessary to insert the *actio non* and prayer of judgment where the plea was pleaded to the further maintenance of the action. As to the names of the justices, it was clear that they ought to have been given; the defendant had no right to leave them in blank. The omission of their names left the opposite party unable to contradict the plea.

*Newman* was to have argued in support of the demurrer.

Leave to amend, on payment of costs, was given.

(a) 2 Barn. & Cress. 2.

(b) 5 Barn. & Cress. 284.

## DAY v. KING and others.

Where justices under the 33 Geo. 3, c. 54, s. 15, and the 49 Geo. 3, c. 125, s. 3, had heard the complaint of a man claiming to be a member of a friendly society, alleging that he had been unlawfully expelled, and that arrears were due to him, and they at first ordered him to be re-admitted, and then, on a subsequent hearing, made an order for payment of the arrears, and issued a warrant of distress against two persons as officers of the society:—*Held*, that an action of trespass was maintainable by one of these persons on whose goods the distress had been levied, all the facts necessary to give the justices jurisdiction not being distinctly found and set forth on the face of the warrant.

**TRESPASS.**—*Plea*, not guilty.—The plaintiff in this case was a college servant, and was also a steward of a benefit club in *Cambridge*, called "The Original Friendly Society." The defendants are the late and present Vice Chancellor of the University, and three other gentlemen, magistrates acting in and for the town of *Cambridge*. The society in question was formed in 1765, and in 1794 its rules were allowed and inrolled by the quarter sessions. These rules were altered in 1804, and again in 1820, but these alterations were not inrolled. The circumstances under which this action was brought, are as follows:—*John Stearn* was a member of the friendly society; he was admitted in 1812, and continued a member until 1833, and at that time he had for a considerable period been receiving weekly relief from the society. The society having some reason to suspect that he had

feigned illness, he was called upon to go before Dr. *Thackeray*, the physician of the society, to be examined as to his state of health, so that the doubts entertained might be satisfactorily disposed of. An appointment was made, but *Stearn* did not keep it, and, at a subsequent meeting of the society, he was called on for an explanation, when, not giving one that was satisfactory, the members investigated the matter, and on the 29th of *October*, 1833, came to a resolution declaring that he was expelled from the society, and his name was erased from the books. The rule, for the breach of which *Stearn* was expelled, was as follows:—

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"Upon suspicion of any member pretending illness, the steward, if required, shall cause such person to be examined by one of the faculty, either physician, surgeon, or apothecary, which of them shall be thought most needful; the expense occasioned by such examination to be paid out of the box, and being found guilty of such imposition, on the declaration of either of the aforesaid faculty, or refusing to be examined, he shall be excluded."

On the 29th of *November*, in the same year, *Stearn* made a complaint to *Thomas Coe* and *Alexander Scott Abbott*, Esqrs., magistrates for the town of *Cambridge*. In pursuance thereof, a summons was issued and served on the then officers of the society. On the 22nd of *November*, the parties appeared before the magistrates, and the hearing was adjourned to the 29th. Contradictory evidence was given as to *Stearn's* conduct, with regard to the appointment to go before the physician of the society, and on this evidence the magistrates ordered that *Stearn* should be re-admitted a member of the society. A copy of this order was served on persons named *Massey* and *King*, at that time officers of the society, but they refused to obey the order. The society did not obey that order. On the 18th of *February*, 1834, *Stearn* took out a summons issued by the same justices, for the payment of his sick allowance money, and served it on the stewards of the society (of whom the plaintiff was at that time one), who appeared by Mr. *Cannon*, their attorney, and after several adjournments, the matter came before the five defendants, who were justices of the borough also, who made the following order for payment of 8*l.* 11*s.*, as a sick allowance:—

"Town of *Cambridge* to wit.—To *John Day* and *Matthew Diver*, stewards of the friendly society, called "The Original Friendly Society," &c.

The order, after reciting the information and complaint of *Stearn* upon oath, which stated that he was a member, before the two borough justices, and the facts stated as above, proceeded—

"We the said justices, whose names are undersigned, did then and there proceed to hear and determine the matter of the said complaint, and make such order thereupon as to us seemed just, according to the statute in such case made and provided; that is to say, we do hereby order and adjudge, by virtue of the said statute, that the said *John Day* and *Matthew Diver* do forthwith and in our presence pay to the said *John Stearn* the said sum of 8*l.* 4*s.*, so due and owing to him for such relief aforesaid; and we do also award and adjudge, that the said *John Day* and *Matthew Diver* shall also pay to the said *John Stearn* the sum of 7*s.* for costs, according to the statute in such case made and provided.—Given under our hands, &c."

The money not having been paid, the defendants issued a warrant of distress, directed "To the constable of the parish of *St. Clement*, in the town of *Cambridge*."



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This warrant likewise recited the above facts, and proceeded—

"And therefore we did order and adjudge, by virtue of the said statute, that the said *John Day* and *Matthew Diver* should forthwith and in our presence pay to the said *John Stearn* the sum of 8*l.* 4*s.* so due and owing to him for such relief as aforesaid, and we did also award and adjudge that the said *John Day* and *Matthew Diver* should also pay to the said *John Stearn* the sum of 7*s.* for costs, according to the statute in such case made and provided. And whereas the said *John Day* and *Matthew Diver* were called upon and required by the said justices, whose names are undersigned, forthwith to pay the said sum of 8*l.* 4*s.*, and also the sum of 7*s.* for the costs, to the said *John Stearn*, in pursuance of our said order, but they have refused, and made default; these are therefore to command you to levy the said sum of 8*l.* 4*s.* &c. by distress and sale of the monies, goods, chattels, securities, and effects belonging to the said society; and we do hereby order and direct, that the monies, goods and chattels, securities and effects so to be levied be sold and disposed of within five days, unless the said sum &c., and in default of such distress being found, then to levy the said sum of 8*l.* 4*s.* &c., by distress and sale of the proper goods of the said *John Day* and *Matthew Diver*, &c., and we do order and direct the goods last-mentioned so to be distrained, to be sold, &c.—Given under our hands and seals," &c.

The plaintiff had ceased to be one of the stewards when the warrant was issued, but the warrant was executed upon his goods, he having first declared that there were not any goods and chattels of The Original Friendly Society, upon which a distress could be made. At the trial of the cause at the last *Cambridge Assizes*, before Lord *Abinger*, his Lordship thought it necessary to leave two facts to the jury; one was, "whether *Stearn* was at Dr. *Thackeray's* at the time appointed?" the jury gave it as their opinion "that he was not;" the other, "whether he was called upon for his defence at the club when they expelled him?" as to which the jury found "that he was called on for his defence." The learned Judge upon this stated it as his opinion, that *Stearn* could not be considered to be a member, though the justices had made an order to restore him, but, on the authority of *Lomther v. Lord Radnor*, he was of opinion that, as the magistrates had received evidence and had adjudicated upon it, though they might be under a mistake as to the facts, and though their order might be void, yet trespass was not maintainable in respect of it. He therefore nonsuited the plaintiff, but gave him leave to move to set aside the nonsuit, and enter a verdict for 8*l.* 11*s.*, if the Court should think him entitled to recover. A rule having been accordingly obtained,

*Storks*, Serjt., *Starkie*, and *B. Andrews* showed cause.—There is not a pretence for saying that this action is maintainable. Here was an adjudication in a matter in which the magistrates clearly had jurisdiction. If they had, their judgment is final and conclusive. There are two rules affecting cases of this kind; first, that if the magistrates have a general power of inquiring into the fact, their judgment upon it is conclusive; secondly, that if the magistrates have this general jurisdiction, though they may not have a jurisdiction in the particular case, still if the facts showing that they have no such jurisdiction are not brought before them, they will be protected by virtue of their general jurisdiction. This is so, though the investigation may involve facts that are material to found the jurisdiction, as in the question of

locality, where the decision of the magistrates, though it may be erroneous, is final. Here the order is good upon the face of it. If a conviction be good upon the face of it, the production and proof of it at the trial will justify the convicting magistrates under the general issue in an action of trespass, as well in respect of such facts therein stated as are necessary to give them jurisdiction, as upon the merits of the case; *Gray v. Cookson* (a). In *Fawcett v. Fowles* (b), where the plaintiff had been convicted for not doing statute duty on the roads, and brought trespass against the magistrates, it was held, that the conviction being good upon the face of it was a sufficient defence, and that the plaintiff could not in this action try the question whether the land which he occupied was exempt from the burthen of repairing the roads. Lord *Tenterden* there said (c), "For some time I was disposed to think this case analogous to some that have arisen on the poor-laws, in which it has been held that if a person, not an occupier or resident within a given parish, be there rated to the relief of the poor, and his goods are distrained for the rate, he may maintain an action against the party levying. But in those cases there was an entire want of jurisdiction. Here the justices had jurisdiction, and the plaintiff was *prima facie* liable." That gets rid of the effect of *Weaver v. Price* (d), which will be relied upon by the other side. Then it is objected that *Day* was not an officer at the time of the order made and warrant issued. But he appeared by attorney, and cross-examined the witnesses, and asked for the adjudication. The 49 *Geo. 3*, c. 125, enables justices for the place where the society is held, to exercise jurisdiction in these matters. In that respect, therefore, the defendants are justified, for they had jurisdiction. The 5th section of that statute declares, that the order of justices shall be final, and shall not be removable into any Court of Law. Its merits, therefore, cannot be tried over again in an action of trespass. The case of *Lowther v. Lord Radnor* (e), decided that trespass would not lie against magistrates acting upon a complaint made to them on oath, by the terms of which they had jurisdiction, though the real facts of the case might not have supported such complaint if such facts were not laid before them at the time by the party complained against, and that case has been distinctly recognized in *Pike v. Carter* (f). On the authority of these cases, this nonsuit must be supported.

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*Kelly and Gunning*, in support of the rule.—At the time of the complaint made, *Stearn* was not a member of the society, and therefore the justices had no jurisdiction whatever. That brings this case within the rule admitted by the other side. The 49 *Geo. 3*, speaks throughout only of a complaint made by a member of the society, so that his being a member is a condition on which the validity of the proceeding must depend. Again, the act directs that the application shall be made to the justices of the county, riding, division, or shire. Here the defendants did not come under any of these descriptions, but were merely justices of the borough. They had, therefore, no jurisdiction under the act itself. *Stearn* here had been properly expelled, and the order to re-admit him did not of itself constitute him a member, but the fact of making the order shows, that his not being a member was fully

(a) 16 East, 13.  
(b) 7 Barn. & Cres. 394.  
(c) *Ibid.* 398.

(d) 3 Barn. & Ad. 409.  
(e) 8 East, 113.  
(f) 3 Bing. 78.

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brought to their notice. *Weaver v. Price* is exactly in point, for there is nothing here on which to found the jurisdiction. There is another objection. The plaintiff had completely ceased to be an officer; now it was only in his character of an officer of the society that he was liable to the jurisdiction of the magistrates. In that respect their warrant is void. The time for objecting to this claim of jurisdiction has not gone by. Where a jurisdiction is created by statute, no consent of a party will establish it, if the facts of the case do not warrant it. Again, the warrant is void for not stating all the facts on which the jurisdiction is founded. It treats the plaintiff as an officer of the society, yet it does not state that he is one, and in fact he ceased to be so before the warrant was issued. In *Wilkins v. Wright* (a), a warrant of commitment for neglecting to pay a sum of money awarded under a bastardy order, was held bad, because it omitted to state that there had been a complaint on oath, that there had been an adjudication by the magistrates, that there was a sum of money due at the time of the commitment, that the party charged was called on for his defence, and that he did not show any sufficient cause for not paying. Here the warrant does not state, directly nor indirectly, the facts necessary to found the jurisdiction.—[*Littledale, J.*—The information states that the party applied against was an officer, and it must be presumed that he so continued.]—In such a case nothing can be presumed; *Rex v. Bourne* (b). All the facts necessary to give jurisdiction must be stated distinctly and positively, *Rex v. Perkasse* (c), *Rex v. Westwood* (d), *Stallingburgh v. Haxlay* (e), *Rex v. Pitts* (f), and *Malden v. Fletwick* (g). They were then stopped.

Lord DENMAN, C. J.—This warrant is most clearly defective. The order of the 4th of April was made after the persons to whom it was addressed had ceased to be officers of the society, and the warrant only recites the complaint as made against them as officers of the society; and it orders them, on account of that complaint, to pay a sum of money, without stating that they are still officers of the society, and then it recites the neglect to pay this money, and the order against them, which can only be good if issued against officers of the society. On the face of this warrant the magistrates do not appear to have jurisdiction, and the warrant is therefore defective. But it is defective in other respects. It does not find that *Stearn* was a member of the society, or that any sum of money was due to him in that character. The magistrates have jurisdiction in matters of this sort, but they must dispose of them by direct adjudication, they must show that all the circumstances necessary to give them jurisdiction did exist, and they must find those circumstances as facts.

LITTLEDALE, J.—I also am of opinion that this order and the warrant is defective. The justices ought to have stated that there was proof of these facts before them, instead of which they merely recite the complaint, and go on to award payment of the money. Now the two persons on whom the order was made had gone out of office a fortnight before the order was

(a) 3 Tyr. 824.

(b) 2 Burr. Sett. Cas. 39.

(c) 1 Siderf. 363.

(d) 1 Stra. 73; S. C. 2 Bott, 647.

(e) 1 Sess. Cas. 131.

(f) Dougl. 662.

(g) 2 Salk. 530.

made, and there ought to have been a fresh summons for the new officers, but instead of that the proceedings go on against *Day* and *Diver*, who had no more control over the funds of this society than any ordinary member.

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**PATTERSON, J.**—This being an action of trespass, the magistrates can only protect themselves by showing a warrant good upon the face of it. Assuming that the magistrates had the power to find whether *Stearn* was a member or not, they should have put on the face of the order and warrant a distinct finding as to that fact. The magistrates here have not found on the face of the order or warrant that *Stearn* was a member, that any money was due to him, or that any of the persons on whom they made the order to pay were officers of the society. They have not, therefore, stated sufficient to justify their warrant, unless we determine that the mere adjudication, without more, is sufficient for the making of the order. We cannot do that. We cannot refer to the terms of the information, or the assertions made in it, and say that we can imply all the facts necessary to give the magistrates jurisdiction.

**WILLIAMS, J.**—I am of the same opinion. In order to give the magistrates jurisdiction, the facts must sufficiently appear on the face of the order. *Stearn's* complaint was made as that of a member of the society. The statute only authorizes the justices to interfere in the case of the application of a member. The justices have not shown those facts by which the order, and consequently the warrant, could be good. The order does not even appear to be made on a person who had the power to obey it. I regret in this case to come to this decision, but the authorities are too strong to allow any one to doubt upon it.

Rule absolute.

### FAULKNER v. CHEVELL.

**DEBT**, on the 22 *Geo. 2*, c. 46 (a).—The declaration stated, that *Charles Pestell Harris*, before and at the times of the committing of the several offences hereinafter mentioned to have been committed by the said defendant, was the clerk of the peace for the town of *Cambridge*, in the county of *Cambridge*, and the defendant then was the deputy of the said *Charles*

To an action of debt upon the 22 *Geo. 2*, c. 46, s. 14, against a deputy clerk of the peace for a borough, for acting as an attorney at the borough sessions, the defendant pleaded that he was not at any of the said times, &c. deputy clerk of the peace, &c. nor did he commit any of the said supposed offences, &c.:—*Held* had on special demurrer.

(a) By which it is enacted—"And to the end that justice may be impartially administered in the several general or quarter sessions of this kingdom, be it further enacted, by the authority aforesaid, that no clerk of the peace or his deputy, nor any under-sheriff or his deputy, shall, from and after the 29th day of September, act as a solicitor, attorney, or agent, or see out any process at any general or quarter sessions of the peace to be held for such county, riding, division, city, town corporate, or other place within this kingdom,

where he shall execute the office of clerk of the peace, or deputy clerk of the peace, under-sheriff or deputy, on any pretence whatsoever, but if any clerk of the peace or his deputy, or any under-sheriff or his deputy, shall presume to act as a solicitor, attorney, or agent as aforesaid, such clerk of the peace or his deputy, under-sheriff or his deputy respectively, shall be subject and liable to a like penalty of fifty pounds, to be recovered in manner aforesaid.

*Quare*, whether the new rules extend to penal actions so as to

\* See post, p. 185, Mr. Justice *Patteson's* and Mr. *Gunning's* statements respecting this word.

prevent a defendant in such an action from pleading not guilty, and *quare* whether such plea would bind the plaintiff in such action to prove all the matters necessary to constitute the offence.

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*Pestell Harris*, so being such clerk of the peace as aforesaid; and the plaintiff further saith, that the defendant so being such deputy as aforesaid, after the 29th day of *September*, which was in the year of our Lord 1749, and within the space of twelve months next before the commencement of this suit, to wit, on the 30th day of *June*, in the year of our Lord 1834, at the general quarter sessions of the peace of our Lord the now King, then holden at the Guildhall of the said town, in and for the said town, (being the town where he the said *Aaron* executed his said office of such deputy as aforesaid,) before *Thomas Coe* and *Alexander Scott Abbott*, Esqrs., and others their companions, justices of our said Lord the now King, assigned to keep the peace within the said town, and also to hear and determine divers felonies, trespasses, and other misdeeds in the said town done and committed, did act and presume to act as an attorney for one *James Davey*, by then, at the said sessions, as the attorney in that behalf of and for the said *James Davey*, managing and conducting the prosecution of a certain indictment against one *Frederick Housden*, and upon the trial at that sessions of a certain issue joined upon the said indictment, and which issue was then tried at the said sessions, contrary to the statute.

*Plea*.—That he was not, at any of the said times in the said declaration mentioned, the deputy of the said *Charles Pestell Harris*, as such clerk of the peace as in the said declaration alleged, nor did he, the said defendant, commit any of the said supposed offences, contrary to the form of the statute in the said declaration mentioned, in manner and form, &c., alleged; and of this he, the said defendant, puts himself upon the country, &c.

*Demurrer*.—For that the defendant had not, according to the late rules, denied specifically some one particular matter of fact alleged in the declaration, or pleaded specially in confession and avoidance, but had put in issue not only the fact of the defendant being such deputy as aforesaid, but also the fact of the defendant's having committed any of the said offences, and the existence of the quarter sessions, and the prosecutions, indictments, and proceedings in the declaration mentioned, and had thereby put in issue several distinct matters of fact alleged in the declaration, and had tendered two distinct issues, one upon the fact of his being deputy, and the other upon the fact of his having committed any of the said offences.

*Joinder* in demurrer.

*Kelly*, in support of the demurrer.—This plea is double, and is, in fact, an informal general issue. If the 21 *Jac.* 1, c. 4, s. 4, is taken to apply to this case, then this plea is not a good plea under this statute. But that statute does not apply to this case; for in *Rex v. Gaul* (a), it was resolved, "that the 21 *Jac.* 1, c. 4, does not extend to any offence created since that statute, so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is as to them as it were repealed *pro tanto*." And a similar rule was laid down in *Hick's case* (b), and in *Shipman v. Henbest* (c). This plea is double. The test of a plea being double, given in *Stephen on Pleading* (d) is, that a plea "must not contain several distinct answers to that which preceded it." That fault is committed in this plea. The plea is

(a) 1 Salk. 372; 1 Ld. Raym. 370.

(b) 1 Salk. 373.

(c) 4 Term Rep. 109.

(d) 3d edit. 251, *et seq.*

contrary to the new rules, where it is said (a), "The plea of *nil debet* shall not be allowed in any action;" and "In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance." He has done neither in this case, but has pleaded a distinct matter of fact, and, in addition to that, the general issue, though in an informal manner.—[*Littledale, J.*—It never was intended that the new rules should apply to this kind of action.]—Perhaps so, but in terms they do apply, and the defendant has endeavoured to evade them.

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*W. H. Watson, contra.*—The plea is good, the declaration is bad. It will be a case of great hardship if the new rules are held to apply to penal actions, which are not within the statute of *Anne*, and where, therefore, however untrue many statements are which are made in the declaration, the defendant will be obliged to contradict some and admit the rest. This plea would be good at common law; it is a distinct denial of the facts stated. *Not guilty* or *nil debet* was always, before the new rules, a good plea to a penal statute (b). The new rules do not apply to all kinds of actions, *Miller v. Miller* (c); and this particular kind of action has not been expressly provided for in them. If it was, the plea of *nil debet* would be taken away by force of these rules from many actions in which statutes have directed it to be pleaded. The plea here merely amounts to a denial of the alleged cause of action. This plea is not double. The meaning of double pleading is, not setting up two distinct matters of answer, but setting up two such matters on one point.—[*Littledale, J.*—Suppose that in an action *quare clausum fregit* you pleaded that the plaintiff was not possessed of the close, and that you did not break and enter, would not that be a double plea?—No; it would only be a plea amounting to the general issue. The general issue is merely a short form to put in issue the allegations in the declaration. The Courts have recently allowed a like comprehensive denial to all the allegations in a plea, by permitting the replication *de injuriâ* in *assumpsit*; *Griffin v. Yeates* (d).—[*Patteson, J.*—You think that if you pleaded not guilty you would not deny the acting as attorney.]—That is the object aimed at by the other side. In the charging part of the declaration, it is said that the defendant, being the deputy, did act as attorney. If that is not specifically denied, it will be taken as admitted. That was so ruled at the trial of *Berkeley v. Watling*, a case now in the new trial paper of this Court. In *Archbold's Digest* (e), several authorities are collected, which show that the rule against duplicity in pleading does not extend to prevent the defendant from denying all the material facts alleged against him. That is all that has been done here. But the declaration here is wrong. It charges that the defendant, so being such deputy, did act as an attorney, contrary to the form of the statute. It ought to follow the words of the statute, and say, "did act as an attorney to sue out process."—[*Patteson, J.*—In the ordinary editions of the statutes that word is misprinted. The real expression is not "to sue out," but "or sue out."—Mr. Gunning stated that he had examined the Rolls of Parliament in

(a) *Hil. T. 4 W. 4, II. ss. 2 and 4.*(b) *Langley v. Haynes*, Moore, 302, Bull. N. P. 197; *Johns v. Carne*, Cro. Eliz. 621; *Wortley v. Herpingham*, id. 766.

(c) 3 Dowl. Prac. Cas. 408.

(d) 4 Dowl. Prac. Cas. 647.

(e) Page 170.

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which the word was "or," and it was so printed in the edition in the *Library of Ainslie's Law*, and in the 3d edition of *Ruffhead's Statutes*; but in the 2d edn. the word was by mistake printed "to."—Of course then that objection to the declaration fails.

Gunning, in reply.—The plea here is clearly bad. There was no necessity for pleading in this form. The defendant might have pleaded that he did not, while such deputy clerk of the peace, act as attorney, or that he did not, being deputy clerk of the peace, act as attorney. *Miller v. Miller* is not applicable to the present case, for that merely decided that the rules common to all the Courts did not affect a case such as that was, where one of them exercised a peculiar and exclusive jurisdiction. The object of the new rules was, that the question in each case should be left less at large than by the then existing mode of pleading.—[*Littledale, J.*—The new rules put debt and covenant together. The object of not permitting the plea of *nil debet* was, that all the matters of real defence should be brought before the Court. Is not the prohibition of that plea a virtual authority that a defendant should be allowed to plead, as under the statute of *Anno*, the different things which are matters of real defence?—If it is so, the defendant should have gone before a judge and obtained leave to plead several matters. The 4th section of the new rules is intended to apply to all actions properly called actions of debt. The statute which gave the right of action here, calls this an action of debt, and this action therefore falls within the new rules.

Lord DENMAN, C. J.—This is a matter of great and general importance, and we should therefore like to consider it.

*Cur. adv. vult.*

Lord DENMAN, C. J. afterwards delivered the judgment of the Court.—This was an action of debt on a penal statute, brought against the deputy clerk of the peace for the borough of *Cambridge*, for practising at the sessions there as an attorney. The plea was, that he was not at any of the said times the deputy, and that he had not committed any of the supposed offences in manner and form as above alleged against him. The plea was said to be double, and was stated to amount only to an informal plea of the general issue; and it was alleged that by this plea the defendant did not deny the fact of his being the clerk of the peace, nor the fact of his having acted as attorney; that the plea of *nil debet* was taken away by the new rules, and that there was nothing to unite this general denial of liability with the statement that he had not committed any of the supposed offences mentioned in the declaration. We think the plea in its present shape is not good. We do not, however, say that a defendant, in an action on a penal statute, may not plead as formerly a general denial of his liability; nor, if he did so, do we express any opinion as to whether that would not bind the plaintiff under such a plea to make out all that would go to constitute the offence. The defendant, therefore, may amend his plea, subject to any further discussion as to whether such a plea in an action of this kind can be supported.

Leave for the defendant to amend on payment of costs.

## WATSON v. WILKES.

**ASSUMPSIT** on a promissory note and account stated. *Second plea.*

That the promissory note was made by the defendant and delivered to the plaintiff, for and in consideration of certain money and goods then agreed by the plaintiff to be thereafter lent and advanced and supplied to him the defendant: and the defendant further saith, that the plaintiff did not, nor would at any time after the agreement and the making and delivery of the said note, lend and advance or supply to the defendant the said money and goods so agreed to be lent, advanced, and supplied as aforesaid, nor any or either of them, or any part thereof, but hath wholly refused, though often requested by the defendant so to do: nor hath the defendant received any other consideration whatever for the said promissory note, and this he is ready to verify, &c.

*Replication.*—That the defendant broke his promise, as in the first count of the declaration mentioned, without the cause by the defendant in his second plea in that behalf alleged; conclusion to the country.

*Special demurrer*, showing for cause, that instead of the general denial in the replication contained, it ought to have traversed or denied, or to have confessed and avoided some one or more of the facts stated in the plea in express words, and also the replication, if meant as the general replication *de injuriâ sud propriâ*, is informally pleaded, inasmuch as it omits to state that the cause of action arose out of the defendant's own wrong: and also for that such general replication *de injuriâ* &c., is not the proper replication in action on promises, &c. Joinder in demurrer.

To a declaration in *assumpsit* on a promissory note, the defendant pleaded that the note was given upon an agreement between the plaintiff and himself, in consideration of certain money and goods then agreed by the plaintiff to be thereafter lent and advanced and supplied to the defendant, and that the plaintiff did not perform the said agreement. The plaintiff replied *de injuriâ*:—Held a good replication.

*Wightman*, in support of the demurrer.—This replication is bad in any way of considering it. In form it is neither the replication *de injuriâ*, for it omits the formal words that the defendant broke his promise of his own wrong, nor is it a traverse of any particular fact stated in the declaration. It puts in issue several facts, such as the agreement, the giving of the promissory note in consideration of the agreement, and the non-performance of that agreement. It is not within the exceptions in *Crogate's case* (a), for it does not consist of mere matter of excuse, but of matter of interest or of authority, in which case it is there resolved that the plea *de injuriâ* is improper.—[*Patteson, J.*—Is this case distinguishable from those which have lately been decided in the Courts of *Common Pleas* and *Exchequer* (b)? They go to the extent of declaring that wherever a plea contains matter of excuse, *de injuriâ* not only may be replied, but is the proper replication.]—The Court of *Common Pleas* has decided, that a replication was informal if it traversed in succession all the facts stated in the plea, and therefore *de injuriâ* was the ordinary form of replication to such a plea: and in *Isaacs v. Farrar*, the Court of *Exchequer* held that *de injuriâ* was a good replication to a plea setting up fraud; but both these cases depended on peculiar circumstances. The rule properly governing this question is, that where the matters are in the knowledge of the plaintiff himself, he must not reply *de*

(a) 8 Rep. 66.

(b) *Griffin v. Yates*, 1 Hodges, 387, 2 Bing. N. C. 579, and 4 Dowl. P. C. 647; *Criep v. Griffiths*, 1 Gale, 106, and 2 Cr.

Mee. & R. 159; *Noel v. Rich*, id. 360, 1 Gale, 225; *Isaacs v. Farrar*, 1 Mee. & Wels. 66, and 1 Gale, 385.



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*injuriâ*, but must traverse some distinct fact on which the defendant can take issue, and that brings it within the rule in *Crogate's* case, which says, that if the defendant excuses himself on the authority of the plaintiff, *de injuriâ* shall not be replied. Here the whole matter depends on the question whether the plaintiff agreed or not in the manner stated, and that circumstance, which was within the knowledge of the plaintiff, distinguishes this case from those which have been mentioned.

*Armstrong, contra.*—The plea here is in effect an allegation of a failure of consideration, and the replication merely denies that. He was stopped.

Lord DENMAN, C. J.—We think that this question of the sufficiency of a replication of this sort, has already been decided in your favour.

Judgment for the plaintiff.

SNOOK v. ROBERT MADDUX, Executor of THOMAS  
SOUTHWOOD, deceased (a).

In *scire facias* a plea that a writ of error has been sued out and was still pending, and that the judgment had not been affirmed or reversed, is bad, as not being an answer to the action.

DECLARATION in *scire facias* upon a judgment for 718*l.* 10*s.* against *Thomas Southwood*, who died leaving the defendant his executor.

*Plea.*—That after the recovery of the judgment, and before the return of the second writ of *sci. fa.*, the defendant sued out a writ of error, which is still depending, undetermined, and in full force, and that the judgment is not yet either affirmed or reversed; concluding with a verification and prayer of judgment.

*Replication.*—*Præcludi non*, because after prosecuting the writ, a transcript of the record and proceedings of the plaint was sent to the *Exchequer Chamber*, which Court afterwards, in *Michaelmas* Term, quashed the writ of error, and the same then and there became and was determined, and the judgment remains in full force and affirmed.

*Demurrer* to the replication, on the ground, first, that the replication vouches no record of the alleged quashing of the writ of error; secondly, that the quashing of a writ of error is not a matter *in pais* cognizable by a jury; thirdly, it does not appear upon what ground the writ of error was quashed; fourthly, that a writ of error being a writ of right and not of grace, the Court of *Exchequer Chamber* had no power to quash; fifthly, that no right to quash a writ of error *quia improvidè emanavit* is vested in the Court to which such writ is returnable, or in any other Court than that out of which it issues; sixthly, that even the Court of *Chancery* has no power to quash otherwise than upon an objection referring to some defect apparent upon the face of the writ itself; seventhly, that upon the plea and replication, it appears that the *scire facias* issued while the writ of error was depending. *Joinder* in demurrer.

*Manning*, in support of the demurrer.—The replication here is bad, and the plea which will be impugned on the other side is good. In *Tidd's Prac-*

(a)—See *ante*, Vol. I. p. 584.

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*tice* (a), a writ of error is described as a supersedeas of execution. That is in accordance with the object of the *scire facias*, which is to call on the defendant to show cause why execution should not issue on the judgment, and which therefore admits the execution to be suspended till cause is shown. The answer that the writ of error has been quashed is not good in law. The Court of *Chancery*, out of which such a writ issues, may quash it for many objections; but the Court into which it is returnable can only quash it for defects apparent on the face of the writ itself; *Lord Say and Sele v. Stephens* (b), *Lloyd v. Skutt* (c). The objection here was, that the writ of error was on a judgment on a feigned issue. If so, the plaintiff might have applied to this Court to refuse the allowance of the writ, or to have issued execution notwithstanding its allowance, or perhaps he might have moved for an attachment for issuing such a writ, if, by the practice of the Court, it was understood that the party who tried such an issue had not a right to a writ of error. But here the plaintiff has joined in error.—[*Patteson, J.*—We cannot know, except by what appears upon the record, on what ground the Court quashed the writ of error.]—The objection to that course of proceeding is, that the cause of quashing the writ does not appear on the record. The Court of Error had no jurisdiction to quash the writ, but for a cause apparent on the face of the record. A party is entitled to a writ of error as of right and not as of grace, and the proper course would have been to apply to the Court to set aside the allowance of the writ, as in *Baddely v. Shafto* (d). In *Denn v. Roake* (e), a motion was made to quash a writ of error in this Court, in which it was returnable, and Lord *Tenterden* said, “The defendants ought, in an earlier stage of the proceedings, to have applied to the Court to quash the writ of error; but they have joined in error, and by their counsel have appeared upon argument. They are much too late.” The other side has not shown at what stage of the proceedings the writ of error was quashed, and as that ought to have been done, the mere allegation that it was quashed is not sufficient. The plea is good; but if any defect should be thought to exist in the plea, that defect is cured by the plaintiff pleading over.

*Butt*, in support of the replication.—The plea is bad and the replication is good. It is admitted that in certain cases the Court of Error might have quashed the writ, and that being so, it must be taken that that Court has rightly exercised its power. It lies on the other side to show that the proceedings of a superior Court are wrong.—[*Patteson, J.*—We cannot know whether the cause for which the writ of error was quashed was apparent on the face of it, for we have not the judgment of the Court before us.—Lord *Denman, C. J.*—Is it not then a judgment which ought to have been set out in the replication?—It is not: the replication properly states the proceedings, and if the other side intended to have raised the argument that the judgment was wrong, or that the Court had not jurisdiction, they should have set out the judgment and the objection to it. But it is not necessary to consider the replication, for the plea is bad. It may be admitted that a

(a) Page 630, 9th ed. and *Myer v. Arthur*,  
1 Str. 419.

(b) Cro. Car. 142.

(c) Doug. 350.

(d) 8 Taunt. 434.

(e) 5 Barn. & Cres. 735, n.

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writ of error is a stay of execution, but the question here is, whether a writ of error pending is a good plea in bar to a *scire facias*. It is not: if it was, a party would only have to issue a writ of error, and the plaintiff would then be obliged to go over all the process again. The course of proceeding in cases like the present has always been, not to plead the writ of error in bar, but to move to stay the proceedings; *Entwistle v. Shepherd* (a), *Christie v. Richardson* (b), *Pool v. Charnock* (c), *Benwell v. Black* (d). In *Comyn's Digest* (e) it is said, that error pending of the same judgment is not a plea in bar to a *scire facias*, and *Dighton v. Granvil* (f) is referred to. That was an action of debt upon a judgment, and a plea of a writ of error pending, pleaded in abatement, was held bad, and the Court there said that it would not be good in a *scire facias*. There is no distinction between debt on judgment and *scire facias*. In *Goodwin v. Goodwin* (g), there was an attempt to plead such a plea as this as a temporary bar, but it was denied even in that way. In *Rowley v. Raphson* (h) it was held, that a plea of writ of error pending was not good either in bar or in abatement, and the observations of Lord Holt, which seem to detract from the force of the ruling in that case, appear to have been purely extra-judicial. If the plea of a writ of error was a good plea at the time, it could only have been a temporary bar, and it has not been pleaded as such, but as an absolute bar. But even then the plea of writ of error must have ceased to be a bar, for that is removed by the quashing of the writ, and the proceedings now may properly go on.—[*Little-dale, J.*—At the passage in *Comyn* there are the words "*Semble contra Shower*;" what is that case in *Shower*?]—It is the same as the case already quoted from *Skinner*, it is a mere extra-judicial dictum.

*Manning*, in reply.—It is admitted on the other side that this plea may be a temporary bar. The only difference between a plea in abatement and a plea setting up a temporary bar, is, as to the prayer of judgment, and that would not be bad on special demurrer. The Court will give judgment on the whole record. If this writ of error was quashed, the judgment of the Court ought to have been *quod cassetur billa*, and if so, that ought to have appeared on the record, and to have been avouched on the pleadings, and the want of it is one of the causes assigned for demurrer.—[*Patteson, J.*—The record itself does not go to the Court of Error, a transcript only is sent, and by the statute constituting this Court of Error (i), the proceedings and judgment are to be entered on the original record, and further proceedings awarded in the Court in which that record remains. If the writ of error was quashed by the Court of Error, there could be no entry on the record.]—That is an argument against the Court of Error exercising its jurisdiction in quashing the writ, if it has no means of entering its judgment on the record.

LORD DENMAN, C. J.—This plea is bad. It is admitted that in debt on a judgment, the suing out of a writ of error would be no plea to the action,

(a) 2 Term Rep. 78.

(b) 3 Term Rep. 78.

(c) Id. 79.

(d) Id. 643.

(e) Pleader, (3 L. 10.)

(f) 4 Mod. 247.

(g) 20 Vin. Abr. 59.

(h) Skinner, 591.

(i) 11 Geo. 4, and 1 Will. 4, c. 70, s. 8.

and I think that the same rule applies with respect to proceedings by *scire facias*. It appears from the reports of the case in *Skinner* and *Showers*, that Lord *Holt* intimated an opinion to the contrary, but that opinion was not necessary to the decision of the case itself, and appears to have been delivered extra-judicially. The party suing out the *scire facias* may not have a right to enforce execution pending a writ of error, but he is not to be put under other disadvantages. It is clear to me that this plea cannot be maintained.

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LITLEDALE, J.—This plea is not good. A writ of error only operates as a suspension of the execution itself, but there seems no reason why execution should not be awarded.

PATTESON, J.—I am of opinion that this plea is bad. The authorities cited apply generally to cases of debt on judgment, and Mr. *Manning* has tried to raise a distinction between debt on judgment and proceedings on a *scire facias*. I think that the same rule applies to both. He says, that a *scire facias* is in substance a rule to show cause why execution should not issue, and that as the party cannot put in force the execution, it would be idle in the Court to say that he shall have it; but he forgets the distinction between giving an award of execution and putting it in force. Here the party has a right to call for the award of execution, and the Court, by awarding it, does not say that notwithstanding a writ of error the party in whose favour the award is made shall be authorized to take the person or the goods of the other. In both the cases of *scire facias* and of debt on judgment, the plea of a writ of error pending is bad, because it is not an answer to the action. If the writ of error is determined in favour of the plaintiff, it is clear that he will be entitled to issue execution. Again, it is said that the writ of error is a temporary bar; I do not understand what that is. In the judgment that the Court now gives, it may be assumed that the writ of error is still pending. If so, and the Court awards execution to one party, the other may come and apply to stay the proceedings. We shall then have all the facts properly before us. It seems to me, that, for the purposes of this argument, there is no distinction between debt on judgment and proceedings by *scire facias*, and that this plea is therefore bad.

WILLIAMS, J. concurred.

Judgment for the plaintiff.

### JONES v. OWEN.

**ASSUMPSIT**, for goods sold and delivered, and on an account stated.

*Plea*, as to the said several sums of money in the declaration mentioned, except as to the several sums of 3*l.* 9*s.* 5½*d.* and 1*l.*, making together 4*l.* 9*s.* 5½*d.*, parcel of the several sums of money in the declaration mentioned, *non assumpsit*: and as to the said sum of 3*l.* 9*s.* 5½*d.*, parcel of the

In *assumpsit* for goods sold and delivered, the plaintiff pleaded, first, *non assumpsit* as to all except a sum of 4*l.* 9*s.* 5*d.*; secondly, a tender as to 3*l.* 9*s.* 5*d.*,

parcel, &c.; thirdly, payment of 1*l.* In neither plea was it stated whether the tender was made before or after the payment. The second plea was specially demurred to:—*Held*, that it was sufficient.

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several sums of money in the declaration mentioned, the defendant says that the plaintiff ought not to have or maintain his aforesaid action thereof against him to recover any greater damages than the said sum of 3*l.* 9*s.* 5½*d.*, parcel &c. in this behalf, because he says, that after the making of the said promise in the said declaration mentioned, as to the said sum of 3*l.* 9*s.* 5½*d.*, parcel &c., and before the commencement of this suit, to wit, &c., he the defendant was ready and willing, and then tendered and offered to the plaintiff to pay him the said sum of 3*l.* 9*s.* 5½*d.*, parcel &c., to receive which of the defendant the plaintiff then wholly refused, and the defendant in fact saith, that he the defendant hath always from the time of making the said promise as to the said sum of 3*l.* 9*s.* 5½*d.*, parcel &c., hitherto been ready to pay, and still is ready to pay to the plaintiff the said sum of 3*l.* 9*s.* 5½*d.*, parcel &c., and he now brings the same into Court here ready to be paid to the plaintiff if he will accept the same, and this the defendant is ready to verify, wherefore, &c.: and as to the said sum of 1*l.*, other parcel of the said several sums of money in the said declaration mentioned, the defendant saith, that heretofore, and after the making of the said promise in the said declaration mentioned as to the sum of 1*l.*, parcel &c., and before the commencement of this suit, and before the plaintiff had sustained any damage by reason of the non-payment of the said sum, to wit, &c., he the defendant paid to the plaintiff the sum of 1*l.* in discharge of his said promise as to the said sum of 1*l.*, parcel &c., and this the defendant is ready to verify.

*Replication* to the plea as to the sum of 1*l.*, parcel &c., that the defendant did not pay &c., and as to the plea of the defendant secondly above pleaded as to the said sum of 3*l.* 9*s.* 5½*d.*, parcel &c. *Special demurrer*, showing for cause, that the plea is pleaded only as to part of the amount admitted to be due and owing by the defendant to the plaintiff; but it is not stated, nor does it appear that at the time of making the tender in that plea pleaded the residue of the debt had been discharged, but for any thing that appears by the plea, the whole amount admitted by the defendant to have been due from him to the plaintiff in respect of the causes of action in the declaration mentioned, still continued owing and unpaid at the time of the making of the tender, and that there is no cause whatsoever assigned or shown to make the tender of the smaller amount a good tender where more was at the time due, &c. *Joinder* in demurrer.

*R. V. Richards*, in support of the demurrer.—The plea is bad; it admits a certain sum due, and then pleads a tender of part as if in satisfaction of the whole. The plea should have been as to all except 3*l.* 9*s.* 5½*d.* *non assumpsit*, and as to that sum, a tender. If the defendant intended to show that the 3*l.* 9*s.* 5½*d.* was a distinct debt, he should have so stated it in his plea; but he has confessed the whole as one debt, and then pleaded a tender as to part. It is a clear rule of law that all the circumstances which show a tender to be good must be pleaded; *Lancashire v. Killingworth* (a).—[Lord Denman, C. J.—Have you any authority for this abstract proposition, that a tender is bad unless pleaded to the whole of the sum stated to be due?—There is no distinct authority for such a proposition, but that is the result of the cases collected in *Chitty on Contracts* (b). A creditor is not bound to

(a) Salk. 623.

(b) Page 619, 2d edit.

accept less than the sum due, for otherwise the debtor might tender part of the sum, and thus deprive the creditor of the right of arrest, and alter the nature of his remedy. The plea of payment shows that the sum tendered was not the whole sum due.—[*Littledale, J.*—In the plea of payment there is an allegation that is not usual, namely, that “before the plaintiff had sustained any damage” the defendant paid.]

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*John Jervis, contra.*—The plea is good. In order to support the objection to this plea, the other plea is referred to; but this plea must be taken by itself, and then it will appear to be good. But if the plaintiff is to be allowed to couple the pleas together, then they amount to an allegation that payment of part was made “before any damage accrued,” and tender of the rest was made afterwards, and consequently that the tender was of the whole sum then due. If the party does not object to the tender at the time, by reason of its being only a portion of the debt, he cannot object afterwards. The defendant might think that he had tendered all that was due, and as no objection was made, it must be taken to have been a good tender. It does not appear on the face of the record that these were not separate debts, and if so, a tender of either would be good as to that debt. If a party owes 20*l.* for a horse, and 10*l.* for a carriage, he has a right to tender separately for each. In *Viner's Abridgment* (a) it is said, “It was agreed in avowry that where the lord distrained for two days' rent in arrear, the tenant might tender one, and the lord would be bound to receive it. So of part of a debt;” which shows that if there are two debts of a distinct nature the tender of one will be good.

*Richards, in reply.*—The defendant has not shown these sums to be separate debts, and as a plea is to be taken most strongly against the party pleading it, they must be considered to have formed but one debt, and then the plea of tender of part is not an answer to a demand of the whole.

Lord DENMAN, C. J.—The objection here is, that a plea of tender is bad because it does not appear that the whole sum due was tendered. But in this case there are pleas of tender and of payment. It is not stated that this payment took place after the tender. Suppose it is necessary that the debtor should tender all that was due, I think that there is nothing to show that this was not done on the present occasion, and, at all events, there is nothing to show that the sum tendered was not tendered as the whole sum that was then due. The plea seems to me an answer to the declaration.

LITTLEDALE, J.—It seems to me that this second plea is a good plea. It is said that the sum pleaded as tendered is not the whole sum due, for that the defendant himself shows that there was a further sum of 1*l.* due. It is then said that a defendant cannot tender one sum when he admits another and a larger sum to be due. I do not think that we can attend to this objection in the present case. As the record stands now, it does not appear when the 1*l.* was paid. It might have been paid before the 3*l.* 9*s.* 5½*d.* were tendered; if so, the point attempted to be made does not

(a) 20 *Viner*, tit. *Tender* (E).

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arise. If the 1*l.* and the 5*l.* 9*s.* 5½*d.* were not sums separately due, the plaintiff should have shown that, but at present each appears to be a separate sum, and the plea of tender of one of them, as here stated, is sufficient.

PATTERSON, J.—Before the new rules nothing would have appeared upon the record but a tender as to part and the general issue as to the rest. The new rules require that if there has been payment it should be specially pleaded. The plea of payment is therefore put upon the record. Then the demurrer comes to this: that there being a plea of payment on the record, the plea of tender is bad, because it does not aver in express terms that the payment was made before, and therefore it is argued that we must assume that it was made after the tender. We are not bound to do this. If the tender was not, as it is argued, a good tender in law, the plaintiff should have denied the tender. If it is a good tender in law, then this demurrer cannot prevail. But I do not in this case give any opinion on the point whether it was a good tender, as I do not think it necessary that it should have been stated that this tender was made after the payment.

WILLIAMS, J.—Mr. *Richards*, in order to found his objection to the plea of tender, is obliged to couple the two pleas together. But even then I can see nothing on the face of either to fix the time at which the payment was made; and if that was previous to the tender, then the tender was of all the money due.

Judgment for the defendant.

GWINNELL v. EDWARD HERBERT.

A. made a promissory note payable to *B.* or his order. *C.* indorsed it:—*Held*, that by this indorsement *C.* did not become a new maker of the note, but was liable only in his character of indorser, and was as such entitled to notice of dishonour.

ASSUMPSIT on a promissory note. The declaration stated that the defendant made his promissory note, &c. *Plea*, that the defendant did not make it in manner and form. The cause was tried before the under-sheriff of Gloucester, when it appeared that the note was made by *Herbert Herbert* in favour of the plaintiff, payable to him or to his order, and that after the making it had been indorsed, not by *Herbert Herbert*, but by the defendant. The note was dishonoured—no notice of dishonour was given to the defendant as indorser, but the plaintiff sued him as maker. The under-sheriff, acting upon the authority of *Penny v. Innes* (a), held that it was a good note to charge the defendant as maker, and a verdict was therefore taken for the plaintiff. A rule had since been obtained to set aside this verdict and have a new trial, on the ground that the action was not maintainable against the present defendant as a maker of the note.

R. V. Richards showed cause.—The under-sheriff's direction was perfectly right. *Penny v. Innes* shows that an indorser of a bill becomes a new drawer. *Plimley v. Westley* (b) is not an authority against that proposition, for in that case there was no direction making the instrument payable to order. The note there was consequently not a negotiable instrument.—

(a) 1 Cr. Mee. & Ros. 439, and 5 Tyr. 107.

(b) 1 Hodges, 324; 2 Bing. N. C. 249; 2 Scott, 423.

[*Patteson, J.*—Do the authorities go the length of saying that any indorser of a promissory note might be treated as a maker? In a bill of exchange every indorser may be treated as a new drawer, for each party has still his rights against the acceptor; but in a promissory note the maker is an acceptor, not a drawer.]—The maker of a promissory note is liable in the first instance, and this defendant has put himself in the situation of the maker of the note.

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Busby, in support of the rule.—The indorser of a promissory note may be liable to be sued in the first instance like the drawer of a bill of exchange, but he is not liable to be treated like an acceptor. The distinction between a promissory note and a bill of exchange has not been sufficiently adverted to by the under-sheriff. That distinction is fully stated by Lord *Mansfield* in his judgment in *Heylyn v. Adamson (a)*. It has been already determined, that where a bill of exchange is perfect in the first instance, there cannot be a second acceptor; but the person who signs as such second acceptor is merely a collateral security; *Jackson v. Hudson (b)*. Here the note was a perfect instrument in the first instance, and the defendant could not put himself into the place of a second maker of the note. The action against him as maker is therefore not sustainable, and notice of the dishonour ought to have been proved.

Lord DENMAN, C. J.—It appears to me that the under-sheriff misread the case of *Penny v. Innes*. In order to hold that a notice to this defendant was not necessary, we must treat the defendant as a new maker of the note. In *Penny v. Innes* the indorser might be treated as a new maker, for there the instrument was a bill of exchange; but he cannot be so treated here, for this is a promissory note, and the maker of a promissory note is in the situation, not of the maker, but of the acceptor of a bill of exchange. In *Plimley v. Westley*, Lord Chief Justice *Tindal* observed, that since the stamp laws every fresh indorsement cannot be considered as constituting at all events a new contract, nor can it be so considered here.

LITLEDALE, J.—I am of the same opinion. The declaration alleges that the defendant made his promissory note, undertaking to pay so much money, but I cannot understand how that allegation is made out here. It is said that every indorser is a new drawer. He may undertake all the same liabilities, but he cannot be said to be the same person, nor is he to be treated in the same manner. The indorser must have notice of the dishonour, not so the original maker of the note. I fully agree with the doctrine laid down by Lord *Ellenborough* in *Jackson v. Hudson*.

PATTESON, J.—The plea here is, that the defendant did not make the note. That is a question on which I think there is not the slightest conflict between the cases of *Penny v. Innes* and *Plimley v. Westley*, if we attend to the distinction between bills of exchange and promissory notes. The whole matter turns on that distinction. In a bill of exchange each indorser is in

(a) 2 Burr. 676.

(b) 2 Camp. 447.

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the nature of a new drawer. It is said so in *Penny v. Innes*, and I do not dispute it. But in the case of a promissory note it is different. The maker of the note is in the situation, not of the drawer, but of the acceptor of a bill of exchange, and he is liable in the first instance, without respect to any other person at all. If every indorser of a promissory note is to be held in the same situation as the maker, then he would be liable in the first instance, which is not the case with the drawer of a bill of exchange. The case of the one does not therefore apply to the other. In *Plimley v. Westley*, the instrument was a promissory note, and in the first instance it was not a negotiable instrument. The indorser, therefore, was not held liable as indorser but as maker, and the note, upon his making, required a new stamp. But here the instrument was a perfect negotiable instrument in the first instance, which makes this case like that of *Jackson v. Hudson*. That was the case of a person who was not the acceptor putting his name upon a bill of exchange as acceptor, notwithstanding which, the bill being already perfect, he did not make himself liable as acceptor; so here, the person who was not the maker of the note put his name upon it as maker, but, the note here being also a perfect instrument, did not by doing so impose upon himself the liability of one. In the report of *Plimley v. Westley*, in *Hodges (a)*, Lord Chief Justice Tindal says, "That a bill or note cannot be enforced against the original maker by a person who takes by indorsement, unless the instrument contains words which authorize the indorsement." Here the instrument did contain such words, and there being one original maker, there cannot, according to the case of *Jackson v. Hudson*, be a second.

WILLIAMS, J.—The plaintiff here has misconceived and misdescribed the liability of the defendant, and has confounded together two things as distinct as they can be from each other. The rule for a new trial must be absolute.

Rule absolute.

(a) 1 Hodges, 324.

REX v. ISLEY and WIFE.

A father appointed two persons executors of his will, and also guardians of the persons and estates of his children, and requested them, according to their discretion, to cause his children to be properly brought up and educated:—*Held*, that this appointment gave the guardians the right to the custody of the children, and the Court therefore took them out of the custody of the grandfather and grandmother, against whom there was no objection whatever, and who, at the desire of the father, had come over from America to take care of them, and directed that they should be given up to the guardians.

IN this case a rule had been obtained for a *habeas corpus* to bring up the bodies of *Matilda* and *Benjamin Harris*, infants, in order to have them delivered over to the custody of *Samuel Gregory* and *William Wilkins*, their testamentary guardians, appointed by the will of their father. It appeared from the affidavits in opposition to this rule, that *Benjamin Harris*, the testator, had married the daughter of *Isley* and his wife; that they had afterwards established themselves in America, but upon the death of the testator's wife they returned from America in consequence of a letter received from the testator, earnestly requesting them to come over and take care of the children. It appeared also, that the testator had always expressed an anxiety that the children should be under the care and protection of their grandmother; that she was devotedly fond of her grandchildren; that the infant *Benjamin Harris* was a child of weak intellects, and both were in a delicate state of health, requiring great care and attention, and that the grandmother

was extremely desirous to be permitted to have them under her care and management, that she might faithfully act in accordance with the last wish and request expressed and made to her by her deceased daughter. In support of the application, the words of the will were relied on, and they were, "I appoint the said *Samuel Gregory* and *William Wilkins* executors of this my last will and testament, and also guardian and guardians of the persons and estates of my children, and I earnestly request that my said trustees and executors will, according to their discretion, cause my said children to be properly brought up and educated."

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Addison showed cause against the rule.—The applicants here are not guardians within the meaning of the 12 Car. 2, c. 24, ss. 8 & 9. There is no heritable property belonging to these children, and the statute was only intended to apply to cases where there would have been before the statute guardians in socage; *Bedell v. Constable* (a). There is not any direct disposition of the custody of the children to these persons. They are merely directed to cause the children to be properly brought up, which they can do well enough while the children remain in the custody of their grandmother. There is no improper restraint here, though even in a case of that kind *Lord Mansfield* said, "The Court is bound to set the infant free from any improper restraint, but is not bound to deliver it over to any person" (b). The advantage of the children is to be consulted; *Lyons v. Blencome* (c). If the arrangement here was for the benefit of the children, the father himself could not afterwards recall it; and here it would be doubly hard upon the grandfather and grandmother, for they gave up advantages of their own in order to come over and take care of these children, which they did at the father's request.

Erle and *P. B. Leigh*, in support of the rule.—The terms of the will sufficiently invest these parties with the rights of testamentary guardians, and with power to claim the custody of the children. The case of *Bedell v. Constable* only shows that a testamentary guardian is bound to show that he was appointed guardian in socage. But other cases do not go to that extent. *Rex v. Johnson* (d) is in point. There the Court, after consideration, handed over the infant to the care of the guardian appointed by the father's will, although there appeared to be no reason to impeach the conduct of the nurse in whose custody she then was. The cases are all referred to there or in *Rex v. Delaval* (e). The fact that these persons came over from *America* at the father's request, is not so strong against his right to dispose of the custody of his children as the covenant entered into by the Earl of *Westmeath* to allow his children to remain under the care of his wife; yet in that case (f) the Lord Chancellor took the children out of the custody of the mother and delivered them up to the father. The authorities collected in *Comyn's Digest* (g) show that a guardian has the same interest and authority as a parent, and that doctrine has always been recognized; and in

(a) *Vaughan*, 177 and 183.

(b) *Rex v. Delaval*, 3 Burr. 1436.

(c) 1 Jac. 245.

(d) *Str.* 579.

(e) *Sir W. Bla.* 410.

(f) *Ex parte Westmeath*, 1 Jac. 251, n.

(g) *Tit. Guardian in Socage.*

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Rex v. Delaval Lord Mansfield distinctly founded himself upon the right of the Court to act upon its discretion in cases like the present.

LORD DENMAN, C. J.—I do not find it argued that this will did not express the actual will of the father in *May* last. By that will he appointed these persons his executors, and gave them the powers of guardians over his children. Under these circumstances, though our discretion is not completely tied up, still we cannot do what appears to be a tampering with the rights of the guardians. There is no statement that they are unfit to have the custody of the children, and therefore we must give them that custody.

LITTLEDALE, J. concurred.

PATTERSON, J.—This case came before me at chambers, and I then declined to interfere without being satisfied that the father intended that the custody of these children should be changed. I cannot say that I am fully satisfied on that point now, but still I think there is not sufficient to justify us in withholding from the guardians the custody of the children thus put under their care.

Rule absolute (a).

(a) *Williams*, J. had left the Court.

REX v. The Inhabitants of MAIDSTONE.

Where a parish apprentice leaves the service of his original master and enters the service of a second master, there must be, for the purpose of the apprentice gaining a settlement under such second service, a clear assent by the first master to the particular service with the second master.

Since the 56 G. 3, c. 139, that assent must be given with the consent of the justices.

THE Sessions confirmed an order of justices for removing *Benjamin Drywood*, his wife and three children, from *St. Mary, Northgate*, in the city of *Canterbury*, to the town of *Maidstone*, subject to the opinion of this Court on the following case:—

The pauper *Drywood* was in *June*, 1814, bound as a parish apprentice to one *Pollard* of *Milton*, basket maker, with whom he lived under the indenture at *Milton* until *August* 1816, when *Pollard* failed, and having no means of employing him, *Drywood* expressed a wish to go and endeavour to procure work in the basket making business, and mentioned *Maidstone* as a place where it was likely to be procured. There were at that time several basket makers in *Maidstone*, but no mention was made of the name of any of them. *Pollard* consented to the pauper's going, but said, that if he got work, he (*Pollard*) should expect to be allowed a trifle out of the wages. To this the pauper assented, and he thereupon left *Milton*. *Pollard* heard no more of *Drywood*, nor did he make any inquiry about him, but having occasion to go to *Maidstone* in *November* or *December* the same year, he casually heard from a traveller that *Drywood* was then working with a basket maker named *Peters* in that town; he called on *Peters*, and found *Drywood* there, and it appeared that he had worked and resided there upwards of forty days before the 1st *October*, 1816, on which day the statute 56 *Geo.* 3, c. 139, came into operation. *Pollard* then asked for a portion of *Drywood's* wages, but being told by *Peters* that the wages were barely sufficient for *Drywood's* support, he went away; the pauper continued after this to work for *Peters*, and to reside in *Maidstone* several months, when he left that place; but he never

returned into *Pollard's* service, or paid him any thing on account of what he earned. The question for the decision of this Court is, whether the service and residence of *Drywood* with *Peters*, as above mentioned, were sufficient to confer a settlement in that parish. If this Court shall decide this question in the affirmative, the order of Sessions is to be confirmed; if otherwise, to be quashed.

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Kelly and *Shea*, in support of the order of Sessions.—The second service here can be connected with the first so as to make the second a service under the indenture. The master here must be taken to have assented to the change, so as to make the service at *Maidstone* a service under his authority. One of the latest cases on this subject is that of *The King v. Banbury* (a), where the service under the second master was held sufficient. The fact that there was no assent of the master before the service, and no assent given with regard to a person particularly named, does not make a sufficient distinction between that case and the present; for in this there was something equivalent to it, if not stronger, namely, that the master stipulated to have some of the wages gained by this apprentice in the second service, so that the master claimed to have a positive interest in that service. Unless the relation of master and apprentice, created between these parties under the indenture, continued to exist, the master could have no right to make any demand of that kind. *Rex v. Whitchurch* (b) and *Rex v. Crediton* (c) are distinguishable from the present, and the former of these must be considered as having been overruled by *Rex v. Banbury*. It may be admitted that there must be an assent to the service, but it need not precede the service; *Rex v. Bradstone* (d) and *Rex v. Bradwinch* (e). The statute 56 Geo. 3, c. 139, does not affect the present case, for before that statute came into operation the pauper had worked above forty days with his second master, and even if the assent of the first master to that service is not supposed to have been given till he found his apprentice working for *Peters*, still that assent, when given, must be taken to have relation back to the time of the commencement of the service, and to have made it from the first a service under his authority.

Bodkin and *Deedes*, *contra*.—The statute applies directly to this case, and the subsequent assent of the master, even if in itself sufficient for other purposes, cannot have relation back to the commencement of the service, but must be taken with reference only to the time when it was given, and then the statute applies and makes it, as an assent without the consent of the justices, insufficient. All the cases cited on the other side show that there must be a clear and express assent of the master. There is none in this case. The assent here given, if it was an assent at all, was qualified in its object and its terms, and no settlement therefore can be gained under it; *Rex v. Shebbear* (f). The doctrine supposed to be laid down in *Rex v. Bradstone* (g) was expressly overruled in *Rex v. Whitchurch* (h), where it was said, "It has been urged that the subsequent assent of the first master

(a) 5 Barn. & Ad. 176.
(b) 1 Barn. & Cress. 574.
(c) 1 East, 69.
(d) 2 Bott, 434.

(e) Cald. 461.
(f) 1 East, 73.
(g) 2 Bott, 434.
(h) 1 Barn. & Cress. 574.

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is sufficient to make the second service a service under the indenture, but the contrary is established by *Rex v. St. Helen, Stonegate* (a)." *Rex v. Banbury* establishes the true rule respecting the assent of the master. He must give his assent to the particular party with whom the apprentice is to serve.

LORD DENMAN, C. J.—The decision in *The King v. Banbury* was not intended at all to interfere with the decisions in former cases, nor at all to controvert the rule laid down by the decision in *The King v. Whichurch*. On the contrary, it was intended that that case should be considered as establishing the rule. There must be an assent by the first master to the particular service to the second, so as to connect the latter with a service under the original indenture. Now that has clearly not been the case here, unless you can import into the case the assent which was given to the particular service subsequent to the passing of the 56 Geo. 3, c. 139. But in order to gain a settlement under an assignment of apprenticeship, without the consent of justices, such an assignment must have been made before the passing of that act, and in the present case no assent was given to the particular service with *Peters* until after the passing of that act. The pauper therefore gained no settlement under that service.

LITLEDALE, J.—I am of the same opinion. The ground on which, before the passing of the statute of 56 Geo. 3, c. 139, an assent by the first master to the service of the apprentice with a second master, was sufficient to make that second service a service under the indenture, was, that the consent was in the nature of an agreement or parol assignment by the first master of the apprentice, for it is only upon that ground that the second service could be considered as a service under the indenture. Now here *Pollard* knew nothing at all about the pauper's service with *Peters* at *Maidstone* until *November*, 1816, so that until that time there could not be said to be any such parol assignment of the apprentice to *Peters*. As to the *rati habitio* in this case, that was not until after the passing of the act, when the provisions of the act interposed and prevented the first master from making any such transfer of the apprentice except with the assent of justices.

PATTERSON, J.—The question in this case is, whether there was any assent by the first master to the service with the second. *Rex v. Banbury* is not in point, for that case was not decided on that question. The resolution of that question in the present instance depends upon whether the first master accidentally calling in *November* or *December*, 1816, at the house of *Peters*, with whom the pauper was then working, and asking for a portion of *Drywood's* wages, is to have relation back so as to operate as a consent by him to the service with *Peters* from the time when that service commenced. There are no cases which have decided that a subsequent assent will have any such operation. In *The King v. Bradwinch* and *The King v. Bradstone*, the service was subsequent to the time when the assent of the first master was given. But here no such service could possibly have operated to give a settlement, because the statute 56 Geo. 3, c. 139, which had come into operation before the assent was given, requires certain provisions to be complied with on the assignment of parish apprentices, which were not complied with

(a) 1 East, 285.

in the present case. In the absence, therefore, of any authority to show that a subsequent assent has relation back to the time when the second service commenced, I am of opinion that no settlement was gained in this case.

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WILLIAMS, J.—In a case like the present no settlement can be gained at all where there has not been a proper assignment. The ground on which a settlement has been held to be gained by a service with a second master, is, that the service has been considered a service under the original indenture. In order to arrive at the conclusion that it is so, it seems reasonable that the party to whom the apprentice was originally bound should know with whom the apprentice was to continue his service, and it therefore is very easy to comprehend why a general permission to go and serve whom he pleased should not be held sufficient, but that a particular assent to the service with a particular individual should be required. That is the ground of the decision in *Rex v. Banbury*. There the person with whom the pauper was about to serve was pointed out to the first master. There was a knowledge on his part of that person, and a particular assent on the part of the first master for the apprentice to serve with him. There is no such knowledge nor assent here in the original part of the transaction. I will not say whether the subsequent assent would have been sufficient, without the statute, to have made a previous service and residence confer a settlement. That statute rendered any assignment by mere assent, without the consent of the justices, altogether invalid, and no settlement could be gained by service under it.

Order quashed.

REX v. JOHN JOHNSON.

IN this case a rule had been obtained for a *certiorari* to remove, for the purpose of quashing the order of the Quarter Sessions of *Chester*, confirming an order of two justices for allowing the accounts of *Thomas Goulburn* and *William Witter*, overseers of the poor of the parish of *Clatton Hofield*, in the county of *Chester*. There had been an appeal against the overseers' accounts, and the Sessions had dismissed that appeal, but had not given costs. The vestry had then voted that the costs in defending that appeal should be paid to the overseers. These costs formed an item in the overseers' subsequent accounts, which were now objected to on that ground. That item was in the following terms:—"Paid to Mr. *Hostage*, for preparing for trial, attending Sessions, counsellor's fees, defending the appeal against the overseers' accounts at the Quarter Sessions in *July* and *October*, 23*l.* 11*s.* 4*d.*" The justices had allowed the accounts with this item, and the Sessions had confirmed the allowance. It was this confirmatory order that was now brought up by *certiorari*.

A vote of a vestry authorizing the payment to the overseers of costs incurred by them in defending their accounts, is bad, and an order of Sessions allowing subsequent accounts, in which such payment formed one of the items, was quashed.

W. H. Watson, showed cause against the rule.—The parish had a right to defend the overseers' accounts, and to charge the expenses of that defence upon the rates. In *Rex v. Gwyer*, Mr. Justice *Taunton*, adopting a passage

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from Mr. *Wilcock's* "Treatise on the Laws relating to the ordering Relief and Settlement of the Poor," says (a), "The overseers are entitled to charge in their accounts whatever they have spent for the parish under the direction of any statute, order of justices, or legal process, for the costs of an order of maintenance or removal, or of an appeal, although decided against them, unless they have been guilty of gross misconduct, or of neglecting to consult the vestry as to the propriety of proceeding in it when there was convenient opportunity, in repaying the legal disbursements of constables, and all other money fairly laid out in the business of the parish." That case fully justifies the order for the payment of this money. There does not appear any thing on the face of the accounts themselves which ought not to be allowed, and if the order of Sessions is good upon the face of it, this Court will not look at any thing beyond them in order to impeach the validity of the order of justices; *Rex v. James* (b).

Sir *W. Follett* and *Chandless*, in support of the rule.—If the Court is to decide upon the very sentence quoted from Mr. Justice *Taunton's* judgment, this rule must be made absolute. What is the meaning of "an appeal" in that sentence? Certainly not an appeal upon any thing that relates to the personal conduct or the accounts of the overseers. But here the costs allowed are costs occasioned by defending these very accounts, and therefore by defending something that relates to the personal conduct of the overseers.—[*Williams, J.*—May not the parish be interested in the question?]*—Yes, as against the overseers, but not otherwise.* There was an appeal against the overseers' accounts, on the ground that the overseers had improperly charged the parish with monies which it ought not to have paid. The costs of that appeal were not given to the overseers by the justices, but the sum now objected to was afterwards allowed to them by the vestry as the costs of defending that appeal. The law never intended that in such a case the overseers should be paid out of the funds of the parish.—[*Lord Denman, C. J.*—Suppose a case where the vestry thinks fit to vote that an appeal upon a new point shall be defended, and it is defended successfully, but because it is a new case the Sessions do not give costs, must the overseers nevertheless bear the expense of the appeal?]*—They must.* The judgment of Mr. Justice *Williams* in *Rex v. Gwyer* (c) put the case upon the true ground, namely, that "rates must be applied strictly in a particular way, unless any law can be shown authorizing a different disposition of them." There is no such law here.—[*Lord Denman, C. J.*—That was a case of relieving overseers from the performance of a duty at the expense of the parish.]—And here it is a case of relieving overseers from the expense of defending their own personal conduct, into which the parish has an interest to examine.

LORD DENMAN, C. J.—We have suggested the strongest case we can conceive to show that it might be possible that the item now objected to might be legal. But upon consideration we cannot say that it is so. The vestry cannot bind the parish to any extent they please. The law imposes certain duties upon the overseers, and they must perform those duties or take on

(a) 2 Ad. & Ell. 226.

(b) 2 Maul. & Selw. 321.

(c) 2 Ad. & Ell. 229.

themselves the consequences of failing in their performance. This is a personal matter for the overseers. The appeal was an appeal against them personally, and they have no right to charge the parish with the expense thereby incurred.

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LITLEDALE, J.—I am of the same opinion. We cannot allow parish officers to defend themselves, at the expense of the parish, against complaints of their accounts made on behalf of the parish. The case put by the Court in the course of the argument is the strongest that can be imagined, and that case does not come up to the point now contended for. Because the justices did not give costs, the vestry thought fit to allow them; but the justices were the proper persons to decide in such a matter. We cannot permit costs to be given to overseers by means which the law does not allow. The appeal was against these overseers personally, and they must personally bear the consequences.

PATTESON, J.—If we could suppose in any possible way this item in their accounts to be legal, we should rather be bound to suppose it in a case like the present than to refuse to do so, but we cannot. Even if the whole vestry had voted this account, and the appellant himself, as one of the vestry, had assented to it, I am hardly prepared to say that it would have been legal.

WILLIAMS, J.—I am quite of the same opinion. The presumption is against there being any interest in the parish except to reduce to as low an amount as possible the allowance of the accounts. There is nothing that could legalize this payment.

Order of Sessions quashed.

LAKE v. RUFFLE.

ASSUMPSIT by the payee against the maker of a promissory note. *Plea*, that the plaintiff, at the time of making the said note, was, and that she still is the wife of one *S. L.* *Replication*, that for seven years before the making of the note, the said *S. L.* had been, and that he still was abroad and absent from the plaintiff, and was not known by the plaintiff to be living within that time. *Special demurrer*, that the replication is argumentative; that the plaintiff, instead of pleading that her husband is dead, pleads circumstances from which she wishes to raise the legal presumption of his death, and that the replication insufficiently sets forth the circumstances to raise that presumption. *Joinder* in demurrer.

A replication to a plea of coverture, that the plaintiff's husband had been abroad for seven years, and was not known by the plaintiff to be living within that time, is bad.

G. T. White was in support of the demurrer.

Espinasse was called upon to support the replication.—The circumstances which furnish the answer to the plea can only be stated in the way adopted in this replication. The plaintiff cannot aver that her husband is dead; it is sufficient if she shows circumstances that enable her, though a married woman, to contract as a *feme sole*. She has stated those circumstances in

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the replication. The defendant should have taken issue on the facts there stated, for if established in evidence, they would form an answer in law to his defence.

Per Curiam.—There is no ground for saying that a replication stating that a woman's husband has been abroad for seven years, and has not been heard of by her during that time, is a good answer to the plea of coverture. The replication can hardly be said to be even argumentative, for it only states something from which an answer to the defence might be inferred.

Judgment for the defendant.

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Assumpsit on the common money counts, alleging in the usual form a promise to pay on request. *Plea*, first, except as to part, *non assumpsit*; secondly, as to that part, payment; and thirdly, that the work and labour had been done and the materials furnished under an agreement that the plaintiff should receive nothing if the work should turn out to be useless, and that it had done so.—*Held*, that this plea was bad upon special demurrer, as amounting to the general issue.

INDEBITATUS ASSUMPSIT for work and labour as a builder, and for materials found, and upon an account stated. The declaration alleged, according to the usual form, that the defendant promised to pay on request. *Plea*, as to all but a sum of 7s. 8d., *non assumpsit*. As to that sum, payment. And as to the sum of 1l. 0s. 9d., other parcel, &c., and parcel for which the defendant is alleged to be indebted to the plaintiff for work and materials, the defendant says, that the work and materials in respect of which he is said to be so indebted was work done, and the materials were provided for the same by the plaintiff for the defendant, in and about the endeavouring to prevent a certain chimney from smoking, and which said work was so done, and the materials provided upon the terms, &c. between the plaintiff and the defendant, that the plaintiff should not be paid for the said work and materials, or any part thereof, unless he should succeed in preventing the said chimney from so smoking as aforesaid: and the said defendant further says, that the said plaintiff hath not succeeded in preventing the said chimney from smoking as aforesaid, but that the same hath from that time continued, and still doth continue to smoke, notwithstanding the said last-mentioned work and materials done and provided; and this the defendant is ready to verify, &c. *Special demurrer*, that the plea amounted to the general issue, and tended to unnecessary prolixity of pleading: that it was an argumentative, evasive, and indirect denial of the cause of action, and that it did not well and sufficiently traverse or confess and avoid.

Busby, in support of the demurrer.—The plea is bad; it amounts to the general issue. In *Comyn's Digest* (a) it is said, that "where a man has no special matter for his justification or excuse, he ought to plead the general issue to avoid prolixity in records, and therefore a plea which amounts to the general issue is bad;" and among the illustrations given of this position are these: "In *assumpsit*, if the defendant pleads a bond given for the debt, and traverses that he was indebted *aliter aut alio modo*, or pleads another promise and traverses the *assumpsit modo et forma*," it is bad. The present plea is a clear violation of that rule, which was expressly recognized in *Carr v. Hinchliff* (b). The defendant cannot, as in this instance, take one part of the

(a) Pleader, Plea (E 13—14.)

(b) 4 Barn. & Cress. 547.

plaintiff's demand, and plead specially to that where his pleading really goes, as it does here to deny the whole cause of action.

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Martin, contrd.—The plea is good at common law. But whether it is so or not, it is clear that the defendant was by the late rules bound to plead in this manner. By them it is declared (a), that "in all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." Such matters in the present case are the doing of the work and the furnishing of the materials at the request of the defendant. This is a plea in confession and avoidance; it confesses the work, but avoids the promise by subsequent matter. If the new rules required the confession of the debt, the argument on the other side would be good; but as they require only the confession of the matters from which that debt may be implied, the argument cannot be supported. One of the illustrations introduced into the new rules shows that the plea is good. It says, "In *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact." It was not the supply of these materials in point of fact that the defendant wished to deny, but to show that the contract under which they were delivered was conditional. It therefore became incumbent on him to set forth the condition in his plea. Another of the new rules (b) says, "In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." Now it is clear that if the transaction was void, no debt could ever arise, and a plea of that sort might be contended to be a plea amounting only to the general issue. Yet the words of the rule expressly require such a defence to be pleaded. In *Potts v. Sparrow* (c), the Court of *Common Pleas* held upon this rule, that though a contract was void as illegal, still the matter must be specially pleaded. *Edmunds v. Harris* (d) is a stronger case than this, for there the Court held, that under a plea that "the defendant never was indebted as in the declaration was alleged" the defendant could not give in evidence the defence that the goods were sold on a credit not yet expired.—[Lord Denman, C. J.—That case is in point in your favour, if it is rightly decided. All the other cases are those of matters *dehors* the contract; here it is a part of the contract. That case has been doubted very much, and it appears in principle very questionable whether such a plea is not a complete denial of the promise *modo et forma*. The example of goods sold and delivered, as given in the new rules, is perhaps not quite so exact as could have been wished.]—The plaintiff here was employed to do certain work, and he stated such facts only as would raise an implied promise in law. The defendant's defence, though connected with the contract, arose out of circumstances not stated in the declaration, and he was therefore obliged to state it in his plea.—[Patteson, J.—The denial of the sale and delivery is understood of the sale and delivery as stated in the declaration. Now in *assumpsit* this is usually alleged to be a

(a) *Reg. Gen.* 4, T. 4 W. 4, s. 1.

(b) *H. T.* 4 W. 4, s. 3.

(c) 1 *Hodges*, 135, and 1 *Bing. N. C.* 594;

see also *Barnett v. Glossop*, 1 *Hodges*, 94.

(d) 2 *Ad. & Ell.* 414; 4 *Nev. & Man.*

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sale and delivery on request ; but if the payment is to be made on a future day, that is not a sale and delivery to pay on request. Your plea says that the plaintiff is not entitled for work and labour to pay on request, but to pay on certain conditions.]—It does so, and that is necessary under the new rules. The case of *Edmunds v. Harris* has never been declared to be doubted. In *Waddilove v. Barnett (a)*, which was an action for use and occupation, the defendant was permitted to give in evidence under the general issue, a notice to pay rent to a mortgagee, such evidence being held admissible with respect to rent becoming due after the notice. In *Bird v. Higginson* a ground of objection similar to the present was taken, but the plea was held to be good. These are cases which have occurred since the new rules. But the plea is good at common law. When the plaintiff has colour, the defendant may plead specially ; *Stephen on Pleading (b)*.

Busby, in reply.—No judgment was delivered on this point in *Bird v. Higginson (c)*. With respect to *Waddilove v. Barnett*, the Court of *Common Pleas* in substance decided, not that the defendant could give evidence of the mortgage under the general issue, but that after notice the holding was not use and occupation under the original landlord, but by the sufferance of the mortgagee. The illustrations of the new rules referred to on the other side are not in point in the present case.

LORD DENMAN, C. J.—This is a case of general importance. We do not mean to be bound by any thing we have thrown out in the course of the argument.

Cur. adv. vult.

LORD DENMAN, C. J., on the last day of the term, delivered judgment. After stating the declaration and plea, he proceeded as follows :—To this plea there is a demurrer, which assigns for special causes that it amounts to the general issue : that it is an argumentative and evasive and indirect denial of the cause of action : that it does not sufficiently traverse or confess and avoid the cause of action. It must first be considered whether the defence set up in the plea could be given in evidence under the plea of *non assumpsit*; because, if it could not, then there is no ground for the demurrer. There is no doubt but it might have been so before the new rules, because, not only might the fact of the actual contract itself have been denied, but it might also have been shown that it was void in law, or that the contract had been performed, or that the defendant was excused from the performance of it by many other circumstances. But since the new rules, (which rules have the force and effect of an act of parliament) in actions of *assumpsit* “the plea of *non assumpsit* is to operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. In actions of *assumpsit* for goods sold and delivered, the plea of *non assumpsit* is to operate as a denial of the sale and delivery in point of fact, and in every species of *assumpsit* all matters in confession and avoidance, including not only those by way of

(a) 1 Hodges, 395 ; 2 Bing. N. C. 538.

(b) Page 421.

(c) 1 Har. & Wol. 61 ; 2 Ad. & Ell. 696 ;
4 Nev. & Man. 506.

discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, must be specially pleaded." One of the general objects of these new rules was to compel a defendant to put his defence specially upon the record; and in conformity with this object, the case of *Edmunds v. Harris* (a) was decided. That was an action of debt for goods sold and delivered, to be paid for *on request*, (and which as to this is the same thing as *indebitatus assumpsit*) to which there was a plea of *nunquam indebitatus*, and at the trial the defendant proposed to prove that the goods were sold on a credit which had not expired when the action was brought; and on a question whether this defence was admissible on the general issue, the Court of *King's Bench* held that it was not; that it ought to have been specially pleaded, and that it was one of the cases which the new rules were framed to avoid. But that case was doubted in *Taylor v. Hillary* (b), on the ground that if the time of credit had not expired the plaintiff would prove a different contract from that which he had stated in the declaration, which was to pay on request; and so also in *Knapp v. Harden* (c), Mr. Baron Parke considered it as doubtful whether *Edmunds v. Harris* was properly decided. We think, therefore, that the case of *Edmunds v. Harris* cannot be considered as a binding authority, and if not, as the defence set up on this record shows a different contract from that which is stated in the declaration, inasmuch as the contract stated in the plea is, that the money should be paid on a certain condition, which has not been performed; it is not a contract to pay *upon request*, and therefore the defence might have been gone into upon the general issue. And in the case of *Waddilove v. Barnett* (d), which was an action for use and occupation, it was determined by the Court, after considering the effect of the new rules, that under the issue of *non assumpsit* the defendant might give in evidence that the plaintiff had *mortgaged* the premises before the defendant came into the occupation, and that the mortgagee had given notice to the defendant not to pay the plaintiff any rent becoming due after such notice. But though the defence might be gone into under the general issue, it does not necessarily follow that the defence may not be specially pleaded. In the case of *Carr v. Hinchliff* (e), a defence was put upon the record, which it was admitted might have been gone into upon the general issue, and yet it was allowed to be a good plea. That was an action for goods sold and delivered, and the plea was, that the goods were sold by the plaintiff as the agent of a third person, with the proper averments of want of knowledge &c., and then the defendant set off a debt due from that third person. The question was much considered in that case, but there, in the first instance, a complete contract was admitted by the plea, showing a *prima facie* liability in the defendant to the action, because, independently of the set-off, the defendant would have been liable. There was, therefore, a confession of the contract stated by the plaintiff, but the plea stated matter which avoided that contract so far as to exonerate the defendant from the performance of it. There is a great distinction between the case of a plea which amounts to the general issue, and that of a plea which merely discloses matter that may be given

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(a) 4 Nev. & Man. 182; 2 Ad. & Ell. 414.

(b) 1 Gale, 22; 1 Crom. Mee. & Rosc. 741.

(c) 1 Gale, 47.

(d) 1 Hodges, 395; 2 Bing. N. C. 538.

(e) 7 D. & R. 42; 4 B. & C. 547.

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in evidence under the general issue. In the latter case, though, as has been observed in the earlier part of this judgment, various things enumerated may be given in evidence under the general issue, independently of any of the new rules, yet it is incorrect to say these things amount to the general issue; they only defeat the contract; but, what in correct language may be said to amount to the general issue, is, a plea containing an allegation that for some reason specially stated the contract does not exist in the form in which it is alleged, and where that is the case, the plea, instead of a direct denial, presents an argumentative denial of the contract, which, according to the established rule of pleading, is not allowed. The allegation in the declaration here is, that the defendant is indebted for work and labour and materials, and that being so, he promised to pay on request. The plea does not confess that the defendant was indebted at all; it admits that work was done and that materials were found and provided; but instead of confessing that any debt was created by that, and showing any thing to avoid it, he said no money was to be paid unless the chimney was cured from smoking, which was not done. This is really saying in most distinct terms, that no debt ever arose, and it therefore falls completely within the meaning of what may be called an argumentative denial of the debt. In *Solly v. Neish* (a), the declaration was for money had and received; the defendant pleaded that the money was the proceeds of goods pledged to the defendant, with a power of sale, by persons who allowed the plaintiff to hold the goods as his own, when they were in fact the property of those persons and the plaintiff, and that the defendant was willing to set off against the proceeds of the goods the advances which had been made on them. There were subsequently pleadings which led to a demurrer. The Court, though they gave judgment for the defendant, said the plea would be bad on special demurrer. In *Gardner v. Alexander* (b), the declaration was for goods bargained and sold. The defence was, that the goods were sold under a special contract that they should be shipped within the current month, and landed in London within a given time, which was not done. On an application to plead several matters, the question was, whether these facts could have been given in evidence under the general issue, or whether it was necessary to plead them specially. The Court of *Common Pleas* said it was unnecessary to plead them; the special contract might be given in evidence under the general issue; and in *Cousins v. Paddon* (c), in the *Exchequer*, *Michaelmas* Term, 1835, it was held, that in debt for goods sold and delivered and work and labour, the defendant may give in evidence, under the general plea of *nunquam indebitatus*, that the goods were worthless and the work useless. Upon the whole, therefore, we are of opinion that the plea now before us cannot be supported, and that there must be judgment for the plaintiff.

Judgment for the plaintiff.

(a) 1 Gale, 227.

(b) 3 Dowl. P. C. 146; and on motion
 for a new trial, 1 Hodges, 147.

(c) 1 Gale, 305; 2 Crom. Mee. & Rosc.

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REX v. The Inhabitants of SOURTON.

UPON appeal against an order by which *Ann Tickle Soper*, spinster, was removed from the parish of *Lamerton*, in the county of *Devon*, to the parish of *Sourton*, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—The respondents proved the birth of the pauper 25 years ago in the parish of *Sourton*, and there rested their case. The appellants called *John Tickle*, who proved that he had been married to the pauper's mother in the parish of *Sourton* seven or eight years before the pauper was born, which was further proved by an examined copy of the marriage register; he then proved that he had since gained a settlement by renting a tenement which he had occupied about 25 years at *Clifton*. The respondents relied on proving the non-access of *Tickle* and his wife, and thereby the illegitimacy of the pauper. They called one *Soper*, and partly from his evidence, and partly from the cross-examination of *John Tickle*, the sessions found the following facts:—that the mother's general residence for a year previous to the birth of the pauper was in *Sourton*: that the pauper went by the name of *Ann Tickle*, though she was called *Ann Tickle Soper* in the order of removal: that *Tickle* had removed from *Sourton* to *Clifton* (one hundred miles distant) about five years before the pauper's birth, and that his general residence from that period to the present had been at the latter place. It further appeared from the cross-examination of *Tickle*, that during his residence at *Clifton* he had been living in incestuous intercourse with his wife's sister, who had borne him children. The sessions were satisfied with the proof of non-access, if they were right in admitting the evidence of *Tickle*, without which they had no sufficient grounds to find the fact of non-access. If that evidence was inadmissible, the order was to be quashed; if it was admissible, the order was to be confirmed.

Neither the husband nor wife can be asked any questions which directly tend to prove non-access, or indirectly but necessarily lead to the same conclusion.

Praed, in support of the order of sessions.—*Tickle* gave no evidence that he was not entitled to give. In *Rex v. Bramley (a)* the reputed mother was allowed to be a competent witness to prove the illegitimacy of her children, and the same principle was adopted in *Standen v. Standen (b)*, where the father was admitted to prove that the first marriage was invalid, though the effect was to bastardise the children of that marriage; and in *Standen v. Edwards (c)*, this rule of his admissibility was recognized.—[Lord Denman, C. J.—The question there was on the validity of the marriage itself, but here the marriage is proved, and the witness is examined to prove something independent of the marriage.]—But the effect of the evidence is the same in both cases. It may be admitted that the party could not directly deny access, but still he may prove circumstances from which the Court may say whether access took place or not. The wife may not be a witness against an assumption of law, but the law will not assume an impossibility, and she may with other witnesses prove the circumstances which constitute the impossibility; *Rex v. Bedel (d)*. In that case it appears from the statement

(a) 6 Term Rep. 330.

(b) Id. 331, n., and *Peake's N. P.* 45.

(c) 1 Ves. jun. 133.

(d) *Cas. Temp. Hard.* 379; 2 Str. 1076;*Andr.* 8.

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of the case by the sessions, that the wife actually did swear to her husband's non-access. *Rex v. Reading* (a) will be cited as a leading case on the other side, but that went upon the ground that the wife was the sole witness; and Lord Hardwicke there said, "But the present will not be a precedent to determine any other case wherein there are other sufficient witnesses as to the want of access; the foundation that is now gone upon is the wife's being the sole witness." The old doctrine of the *Quatuor maria* was first put an end to by *Pendrell v. Pendrell* (b). The ruling in that case is expressly approved of in *Buller's Nisi Prius* (c). This is not a case in which the husband's and wife's interests are involved, and therefore cannot be affected by the principle governing such cases; it is a question between two parishes as to which of them must support a pauper. Here the husband is called to prove the legitimacy, for he is called to prove the birth during the marriage. He may be cross-examined to show under what circumstances the birth took place.—[Lord Denman, C. J.—Do you not assume too much in saying that he is called to prove the legitimacy? The birth during the marriage will not alone prove the legitimacy, nor put an end to the question of his being the father.]—The marriage and the birth during the marriage being proved, the legitimacy would in ordinary cases be supplied by operation of law.—[Lord Denman, C. J.—Then he would not be a witness to prove the legitimacy.]—He would, by proving circumstances from which the legitimacy would be inferred. He may be cross-examined to show that such an inference does not properly arise. The evidence here cannot be rejected without excluding evidence in many cases where it is now clearly admissible. Suppose a case of an action by a seaman for wages, could any other seaman refuse to answer as to his being in the *East Indies* at a certain time, because the effect of such evidence might be to show that children born during his absence from his wife were illegitimate. The probable effect of evidence cannot be considered in the question of its admissibility. All the cases where evidence like the present has been rejected, have been cases where the only evidence on the point was that of the husband or wife. *Rex v. Rook* (d) was a case of that sort. Other questions except those of access or non-access may be asked of the husband or wife; *Goodright d. Stevens v. Moss* (e); and that is all that was pretended to be done in this case.—[Patteson, J.—It does not seem to me to be disputed that the parents may be witnesses to bastardize the issue by other evidence than that of non-access.]—Then this evidence is admissible, for it does not deny access, but merely shews circumstances on which the Court may judge of the question of legitimacy. In *Rex v. Luffe* (f), Lord Ellenborough, after stating that a wife may prove an adulterous intercourse, says (g), "And by a parity of reasoning it should seem, that if she be admitted as a witness of necessity to speak to the fact of the adulterous intercourse, it might also perhaps be competent to her to prove that the adulterer alone had that sort of intercourse with her by which a child might be produced within the limits of time which nature allows for parturition."—[Lord Denman, C. J.—But in that case the Court

(a) Cas. Temp. Hard. 79; Andr. 1^o.

(b) 2 Str. 925, cited by Lord Ch. Talbot,
3 P. Wms. 276.

(c) Pages 113, 294.

(d) 1 Wils. 340.

(e) Cowp. 591.

(f) 8 East, 193.

(g) Id. 203.

did not act on her evidence alone. *Rex v. Kea* (a) is not an authority applicable here, for there the direct question of access or non-access was put to the wife. The husband here does not contradict the wife, for she has not been examined, and her evidence is therefore admissible. *Rex v. All Saints* (b), overruling *Rex v. Cliviger* (c). *Rex v. Bathwick* (d), carried that principle much further, and in a case between third parties allowed this contradiction of the testimony of the husband by that of the wife.

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Crowder, contra, was stopped.

LORD DENMAN, C. J.—We do not think it necessary that we should hear the other side, as we are desirous of showing that we adhere to the old rule, without intimating any doubt or hesitation upon the subject. That rule is very correctly laid down by Mr. *Starkie* in his Treatise on the Law of Evidence (e), and Lord *Mansfield's* opinion in the case of *Goodright v. Moss*, and Lord *Ellenborough's* in *Rex v. Kea*, are cited by him in support of it, and it is to be taken as clear and indisputable law, that neither husband nor wife can be admitted to prove the fact of non-access. The question then is, whether the facts here bring this case within the rule. It would perhaps have been desirable to have known precisely the questions asked and the answers given by *Tickle*, but it is impossible not to see upon the case itself that the object of the cross-examination of the husband was to prove non-access. He was asked questions on cross-examination tending to prove facts, the necessary consequence of which, when proved, was to show the impossibility of access by the witness, the husband, to his wife, the mother of the pauper. If the husband had, with respect to other matters, stated facts which the Court might take into consideration as ingredients for forming an opinion on that question, such proof might have been admissible; but when the avowed purpose and object of the examination was to prove the fact of non-access, it appears to me impossible to say that the rule of law does not apply. The sessions, in stating this case, say, that it appears from the examination of *Tickle*, that during his residence at *Clifton* he lived with his wife's sister, and that the sessions were satisfied of non-access if the evidence of *Tickle* was admissible, but not so if it was not admissible. Here there is evidence taken for the very purpose of proving non-access, and here are the sessions deciding that matter expressly on the evidence of the husband. It is as clear, therefore, as words can make it, that the finding of the sessions proceeded upon evidence which by a most undoubted rule of law was not admissible. It is for the public advantage that that rule should be strictly enforced. The order made in consequence of evidence obtained through the non-observance of it must be quashed.

(a) 11 East, 132.

(b) 6 Maule & Sel. 194.

(c) 2 T. R. 263.

(d) 2 Barn. & Ad. 639.

(e) Vol. 2, p. 139, last edit. as follows :—
“ Either of the parents is competent to prove the bastardy of a child for want of a legal marriage, although such evidence is open to much observation. It has been said, that the mother being a married woman, is not competent to prove the non-access of the husband,

as it seems upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter which affects his interest or character, unless in cases of necessity, and on that account it is at all events allowable to examine her as to the fact of her criminal intercourse with another, since it is a fact which must probably be within her own knowledge and that of the adulterer only.”

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LITLEDAL, J.—At the sessions the material point in question was access or non-access of the husband of the pauper's mother, and the question is, whether the sessions were right in allowing the evidence of *Tickle*, the husband, upon any matter necessarily leading to the proof of non-access. I entirely agree with the rule of law upon this matter, as laid down by Mr. *Starkie* in his *Law of Evidence*, and it appears to me that the rule so laid down goes further than to say that the parents are incompetent to prove non-access in direct terms. The rule extends to shut out their testimony in all cases whatever where their evidence tends to prove the fact of non-access. Suppose an issue sent from the Court of *Chancery* to try the question legitimate or illegitimate, but sent in this form, whether, a marriage being admitted, the husband and wife not living together when the child was born, it was legitimate or not. In such an issue, in my view of the case, the evidence of neither husband nor wife would be admissible at all; but that immediately it was made to appear that they were husband and wife, the question of access or non-access could not be put to either of them. *Tickle* might be examined as to his residence in *Clifton* and as to other matters, but the sessions here admit that the other parts of the case did not affect the settlement, and that the whole and avowed object of the cross-examination was to prove non-access. As far as his evidence could go to prove that particular point, it was not receivable at all. It might be important as to other parts of the case, but it ought to be laid aside upon this point; for as far as it went to prove this point, it was as inadmissible as if he had been directly asked the question.

PATTERSON, J.—It is much to be regretted in this case that the evidence of *Tickle* is not set out upon the case, for it is difficult to know really what the question is that the sessions mean to submit to us for our consideration. We must however take the question to be, whether they were right in admitting the evidence of *Tickle* on cross-examination to prove non-access, he having been called by the other side for another purpose. In this, as in most other settlement cases, a number of issues was to be tried, and there can be no doubt that *Tickle* was competent to prove some of the facts involved in those several issues, and on his examination in chief he proved the fact of his having occupied a tenement at *Clifton* for 25 years; but then the respondents go on to cross-examine him as to facts, the result of which necessarily go to prove non-access. Now the direct question, whether he had access or not, it is admitted he could not be legally asked. But the questions which were put to him in cross-examination were directly with the view to prove non-access. It would, as it appears to me, be trifling to say that he could not be asked to answer the question in direct terms, and yet that he might be asked questions which would indirectly but necessarily lead to the same conclusion. I think that on the direct issue of access, or non-access, whether raised at the sessions or in *Chancery*, neither husband nor wife is to be examined at all.

WILLIAMS, J.—Had the rest of the Court been of that opinion, I should have been for sending the case back to the sessions, that the evidence of *Tickle* might have been set out. I shall however assume upon this statement, that the sessions would not have been satisfied as to the fact of non-

access, except for the evidence given by *Tickle*; and I shall also assume that *Tickle* was examined as to that point, and with the object of ascertaining from him the fact of non-access. Then beyond all question he was incompetent to give such testimony, as it is a well-established rule of law, that on the fact of access or non-access, husband and wife cannot be examined. Then, considering that *Tickle*, the husband, was in the present case examined on that point and with that view, and that the determination of the sessions proceeded upon his evidence, I think that the order of sessions cannot be supported.

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Order quashed.

DOE *d.* JONES and others and WILLIAM DAVIS *v.*
G. WILLIAMS and RICHARD HERBERT.

AT the trial of this ejectment before *Williams, J.* at the Spring Assizes, 1835, for the county of *Cardigan*, it appeared that the premises sought to be recovered in this action had been mortgaged in fee in 1768, and the lessor of the plaintiff, *William Davis*, was heir-at-law to the mortgagee, and the defendant, *G. Williams*, claimed as heir-at-law of the mortgagor. From 1808 to 1812, proceedings were had in a suit in the Court of *Great Sessions* in *Wales* for foreclosing, but no rent or interest was proved to have been at any time paid by the mortgagor in possession. It was proved, that in 1814 an application was made by the mortgagee for payment of the money, when *George Williams* was stated to have offered in conversation to give a bond for the money, but that offer was not accepted. It was objected at the trial, that there having been no payment of interest or rent for the last 20 years, the statute 3 & 4 *Will. 4, c. 27 (a)*, applied to preclude the mortgagee in this case from recovering, and that the supposed acknowledgment by the offer by *Williams* to give a bond, did not take the case out of the statute. His Lordship left it to the jury to say whether the money was still unpaid, and directed them in that case to find a verdict for the plaintiff; but said,

The possession of a mortgagor is still, notwithstanding the 3 & 4 *W. 4, c. 27*, a possession not adverse to the mortgagee; and therefore, where such possession had existed for more than twenty years, it was held, that no acknowledgment in writing under the 14th and 15th sections was required to take the case out of the statute, but that the mortgagee might recover under the 15th section notwithstanding such possession.

(a) The 2d section of that act enacts, "That no person shall make an entry or distress, or bring any action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims: or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued, to the person making or bringing the same."

The 3d section enacts, "That when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

The 14th section declares, "That when any acknowledgment of the title of any person entitled to any land or rent shall have been

given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land," the right by the person to whom the acknowledgment is given, "to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have accrued at the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

The 15th section provides, "That when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest at any time within five years next after the passing of this act."

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that if they thought the money had been paid and the estate re-conveyed, they must find a verdict for the defendants. The jury found a verdict for the plaintiffs, finding that there had been no payment of any rent or interest for the last twenty years. A rule had been obtained calling on the lessors of the plaintiff to show cause why a nonsuit should not be entered, upon the ground of the objections taken at the trial, or why a verdict should not be entered for the defendant *Herbert*, on the ground that he could not be affected by an acknowledgment made by *Williams* alone, and not in his presence or by his authority.

J. Evans, and *V. Williams*, showed cause.—The parol acknowledgment is in this case sufficient to take the case out of the statute. What the law was upon this point before the statute will be found by reference to *Hall v. Doe d. Surtees (a)*. In that case premises were mortgaged in fee, with a proviso for re-conveyance if the principal was not paid on a given day, and in the meantime the mortgagor was to continue in possession. A special verdict found that the principal was not paid, but that the mortgagor did continue in possession. It was held that this possession was by the permission of the mortgagee, that it was not adverse, and that, though more than twenty years had elapsed since default in payment, the mortgagee was not barred by the Statute of Limitations. The question of the subsistence of the mortgage is there spoken of by Lord *Tenterden* as one for the consideration of the jury. The circumstances here were left to the jury, and were sufficient for them to draw the conclusion that the mortgage was not satisfied. Before the recent statute, it is quite clear that the lessor of the plaintiff would have been entitled to recover. What difference is made in the case by the new statute? None whatever in this respect, for if the jury thought that the mortgage money was not paid, length of possession would not affect the question, for then the possession would not be adverse; and unless it was adverse at the time of the passing of this act, according to the provisions of the 15th section, the plaintiffs are entitled to recover. The mortgagee is the bailiff of the mortgagor, and the possession of the former is not adverse to the title of the latter. The plaintiffs, therefore, had five years after the passing of the act to bring the action, and it has been brought in time. As to the objection, that the acknowledgment, if good with regard to *Williams*, will not affect *Herbert*, the answer is, that they defend on the same possession by the same attorney, and that the consent rule shows that they stand in the relation of landlord and tenant. The acknowledgment of the landlord, *Williams*, must bind the tenant, *Herbert*.

Wilson and *Chilton*, in support of the rule.—It is clear that at least the defendant *Herbert* is entitled to have a verdict entered for him; he made no acknowledgment whatever, and the consent rule does not show that he is tenant to *Williams*. It does not show which of the two men is landlord and which tenant. The mortgage was in 1768, and there is no proof of payment of interest, nor any that the possession of the person through whom the defendants claim was a possession under the deed. The only thing in favour of the plaintiff is a conversation repeated by two women, who were digging

(a) 5 Barn. & Ald. 687.

potatoes, and who spoke to having heard an offer by *Williams* to substitute a bond for the mortgage. That offer can only affect *Williams*; but with regard to him, the case must be decided on the construction of the 2 & 3 *Will.* 4, c. 27. Under the second section of that act, the first question will be, at what period did the title of the mortgagee accrue. If at all, it must have been upon the day of the execution of the instrument of mortgage, or when the money became due and was not paid, and the estate thereby became forfeited. There was a distinct finding of the jury, that there had been no payment of rent nor interest for above twenty years, yet the mortgagor held possession. That possession was therefore adverse during the whole of that period. The other party was bound to show that it was not adverse, in order to bring himself within the 15th section. The plaintiff cannot recover the money secured by the mortgage in any action at law, for the 40th section of the act prohibits such action after the lapse of twenty years. Nor can he by the 24th section bring any suit in equity to recover the land after the lapse of that period. And yet if he is allowed to succeed in this action, he will be enabled to do indirectly what the statute has refused him permission to do directly, for after this ejectment he may file his bill in equity for a foreclosure.—[*Patteson, J.*—If the legislature meant that an ejectment must be brought within twenty years after the last payment of interest, why not say so?—It has said so; it was so decided in *James v. Salter(a)*, where an annuity granted by will was held exempted from the operation of the statute, solely because a will was a case excepted under its provisions.

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Lord DENMAN, C. J.—This ejectment is taken to be barred by the effect of the 2d and 3d sections of the 3 & 4 *Will.* 4, c. 27. In the 14th section of the act is contained a proviso, which runs through that and all the intervening clauses, requiring an acknowledgment in writing to take the case out of the statute. The 15th section follows, and provides, that where no such written acknowledgment shall have been given, and the possession is not adverse at the time of passing the act, a person having a right of entry shall be enabled to bring his action within five years of the passing of the act. In order, therefore, to bring the case within the enactment which makes it necessary that there should be some written acknowledgment, it is requisite to show that the possession was adverse at the time of the passing of the act; and it has been contended on the part of the defendant, that the possession in this case was adverse, because more than twenty years have elapsed since the last payment of any interest. But it appears to me that that consequence does not follow, for when we see that as a general rule the possession of the mortgagor is consistent with the title of the mortgagee, I do not find in answer to that general rule any proof that in fact the possession in this case was an adverse possession at any particular period. The non-payment of interest will not alone make it an adverse possession. It is not necessary, therefore, that any written acknowledgment should be proved in this case, though more than twenty years have elapsed since the execution of the instrument under which the plaintiff claims possession.

LITLEDALE, J.—It appears to me that the statute 3 & 4 *Will.* 4, c. 27,

(a) 1 *Hodges*, 405; 2 *Bing. N. C.* 605; 2 *Scott*, 750.

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will not prevent the lessor of the plaintiff from recovering in this ejectment. By the 15th section, when no such written acknowledgment as is required by the statute has been given, and the possession at the time of passing the act has not been adverse, a party claiming has five years after the passing of the act within which to bring his action. This seems to me to leave this case in precisely the same situation as it would have been in had the question arisen before the statute was passed. Proof is given of an acknowledgment by the heir of the mortgagor that the mortgage money is still due. This then is a distinct recognition of the right of the mortgagee, which shows the possession not to have been adverse. As this action therefore was brought within the five years, and the possession was not adverse at the time of the passing of the act 3 & 4 Will. 4, the effect of the 15th section is to reserve to the lessors of the plaintiff the right to maintain this action. The 40th section has nothing to do with the case. This is an action to recover the land, not the money.

PATTESON, J.—The 15th section enacts, that when no such acknowledgment as is required by the previous section shall have been given before the passing of this act, and the possession or receipt of the profit of the land, or the receipt of the rent, shall not at the time of the passing of the act have been adverse to the right or title of the person claiming to be entitled thereto, such person may, notwithstanding the period of twenty years shall have expired, bring an action. It plainly appears from this section, that something hereafter was to be considered adverse which at the time of passing the act was not so considered, and that something is the being in possession for twenty years without payment of rent or interest. Then, in considering the present question, we have to see what the law was with regard to adverse possession at the time when the act passed. It is clear, that as mortgagor and mortgagee, the parties stood in a relation to each other which made the possession of the one not adverse to the right of the other. I do not understand how that relation has been described. Sometimes it was said to be a tenancy at will, sometimes that the mortgagor was tenant at sufferance to the mortgagee, and at others, that he was bailiff; and in the last case on the subject, Lord *Tenterden* said that he was not able to state what it was; but, at all events, it is perfectly clear that the possession of the mortgagor is not adverse to the right of the mortgagee. If a written acknowledgment of the right of the mortgagee be given, the action must be brought within twenty years of the date of that instrument; but no such acknowledgment having been given in this case, still, however, the possession not being adverse, the lessor of the plaintiff had five years from the time of passing the act within which to bring his action. As to the meaning of the 3d section, as to the right of the mortgagee upon the forfeiture, I cannot clearly see my way through it; and with respect to the 40th, it is about one of the worst drawn and most confused section that I have ever perused; but it does not appear to me to be applicable to the present case.

WILLIAMS, J.—I am of the same opinion upon the construction of the 15th section.

Rule discharged.

The KING v. The Inhabitants of ASLACKBY.

THE Sessions quashed an order for the removal of *Elizabeth Hanson* and her two children from the parish of *Aslackby* to the parish of *Pointon*, subject to the opinion of the Court on the following

CASE.

William Hanson, the late husband of the pauper, rented a public-house and two acres of land in the parish of *Pointon*, at the annual rent of 28*l.*, for four years previous to his decease, which happened in *May*, 1830, and he also rented during the same time five acres of land in the said parish of *Pointon*, at the yearly rent of 10*l.* 13*s.*, which rents, as they became due, he paid up to the time of his decease. In 1825, the said *William Hanson* purchased of *Theophilus Russell Buckworth*, Esq. several closes of land in *Aslackby* for 670*l.*, in consideration of which sum, by indentures of lease and release, dated respectively the 10th and 11th days of *January*, 1828, the said closes of land were duly conveyed to the use of him the said *William Hanson* for life, with a remainder to a trustee during his life to prevent dower, remainder to the said *William Hanson* in fee; and immediately upon the conveyance of the same, the said *William Hanson* granted a mortgage thereof to *Mr. Benjamin Smith* for 450*l.*, and the said *William Hanson* died seised of the said lands in *Aslackby*, the said mortgage debt, with a considerable arrear of interest, being still a charge thereon.

"By will dated the 24th *May*, 1830, and legally executed for passing real estates, the said *William Hanson* devised all his real and personal estates to *Thomas Caswell* and *Joseph Wilkinson*, both large charge bearers and residents in *Aslackby*, in trust for sale, and to apply the proceeds therefrom in payment of his debts due on mortgage or specialty or simple contract at the time of his decease, and the interest of such debts as should carry interest, and also his funeral and testamentary expenses, and the residue to his wife, (the pauper) to and for her own use and benefit:" to which words he added, "And I give and bequeath the same monies and premises accordingly." And he appointed the said *Thomas Caswell* and *Joseph Wilkinson* his executors. The testator died very soon after the date of his will, which was duly proved by the executors. Since the testator's death, the trustees and executors have possessed themselves of all his personal estate, consisting of all his household goods and furniture, cows, horses, waggons, and stock in trade, and have occupied all his real estate, but have rendered no account of any sort to his widow, who with her children has been residing with her father in the said parish of *Aslackby*. Upwards of a year after her husband's death, and whilst so resident in the said parish of *Aslackby*, *Caswell*, the trustee, on her application for assistance, paid to her 30*s.* by two payments on account.

The respondents called *Mr. Benjamin Wilkinson*, the attorney for the trustees, who proved that the estate had been put up for sale, but that no offer had been made for it, and that there was a large arrear of interest which had accrued due since the decease of the testator, and that the trustees would be glad to sell the estate for the amount of principal and interest. The respondent's attorney then called *Caswell* the trustee, who being sworn,

A testator purchased land in the parish of *A.* and mortgaged it, and by will devised it to trustees in trust for sale, and to apply the proceeds in payment of his debts, and the residue to his wife for her own use and benefit:—*Held*, that under this devise the wife had an equitable estate in the land itself such as to confer a right to a settlement: that actual residence on the land itself was not necessary, residence in the same parish being sufficient: that the occupation of the land by the trustees under the will was not an adverse possession by them against her, and that evidence as to the value of the land, with the view of proving that there would be no residue after payment of the debts, was immaterial, the question being what estate the wife took under the will, and not what was the value of that estate.

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was asked as to the solvency of the testator's real and personal estates, but the attorney for the appellants objected to the evidence, on the ground that the Court of Quarter Sessions was not the proper tribunal for such an inquiry, and that as the pauper, who was alone interested in that inquiry, was admitted never to have been apprized of the state of the husband's affairs, or had particulars or account thereof rendered to her, the Court could not enter upon the subject, either of the accounts or present value of the estate which still remains unsold and in the occupation of the trustees, as these were subjects to be adjusted either by the parties themselves or by the Court of *Chancery*. The Court of Quarter Sessions concurred in this objection, and quashed the order, subject to the opinion of this Court, under the foregoing circumstances, on the admissibility of the evidence, and as to whether the pauper took under the will a sufficient estate to confer a settlement, no adjustment of the said pauper's affairs having in the course of four years been brought to any conclusion.

Amos, in support of the order of sessions.—The mortgage here is out of the question. A devise of the residue confers a legal estate by which the devisee gains a settlement. Such a devise, after payment of debts, amounts not merely to a pecuniary bequest, but to a devise of an interest in land; *Roper v. Radcliffe* (a). The principle there laid down was afterwards expressly applied to settlement law in *Rex v. Wivelingham* (b); and in *Rex v. Edington* (c), this Court held, that an equitable estate in the wife, where she had always continued in possession, passed to a second husband, and that he and his wife, by residing on the premises for more than forty days, gained a settlement.—[*Patteson, J.*—There is a recent decision of the present Lord Chancellor, as to what shall be deemed an interest in land, reported in the *Law Journal*.]—The interest here is clearly an interest amounting to an equitable estate, so as to entitle the party to be considered as having an estate in the parish.

N. R. Clarke and Bourne, contra.—The most recent decisions have established that no equitable interest, unless amounting to an equitable estate, would confer a settlement. This is not an equitable estate. The estate here is devised to trustees, who are to pay debts, and if there is any thing left, they are to pay it over to the pauper. This case most resembles that of *Rex v. Geddington* (d), where a written agreement was made for the purchase of an estate, to be paid for by two instalments, the purchaser to be let into possession on payment of the first. He was so let into possession, and so continued for a year and a half, but never paid the second instalment, and the contract was afterwards given up, the pauper receiving back part of the instalment which had been paid. It was held, that under this contract the purchaser did not acquire an equitable estate so as to gain a settlement under the 9 *Geo. 1, c. 7, s. 5.*—[*Littledale, J.*—But the purchaser there, and the widow here, are in a different situation; the property belongs to her, though the debts charged upon it must be first paid. She has an interest in the whole, and for any thing that appears in this case, the personal estate might be sufficient to pay off the mortgage and the debts.] But until the debts were paid she could not go into a Court of Equity

(a) 9 Mod. 167, 181; 2 P. Wms. 5.

(b) Doug. 767.

(c) 1 East, 288.

(d) 2 Barn. & Cress. 129.

to compel a conveyance.—[*Littledale, J.*—A Court of Equity would first direct an account of the personal estate, and if that was sufficient, the trustees could not come upon the land at all.—*Patteson, J.*—The cases in *Chancery* are decisive with respect to the nature of interests of this sort. Suppose that this party had died in the lifetime of the testator, the residue would have gone to the heir at law and not to the next of kin.]—But the party must have a clear equitable estate, such as would make a Court of Equity put her into possession of the land, and that was not proved to be the case here, for the sessions refused to hear evidence to show whether there would be any surplus. If there was no surplus all the land was gone. The case of *Rex v. Geddington* has been confirmed by that of *Rex v. Woolpit (a)*. In *Rex v. Berkswell (b)*, the pauper had an equitable interest in the property, upon which she and her husband resided for some years, but that was held not to be sufficient to confer a settlement. The principle on which a party gains a settlement by estate is, that he is not removeable; but how can he be said not to be removeable from a place where he has no right to reside? *Rex v. Cregrina (c)* shows that the party must have such an interest as would entitle him as of right to reside on the property. In all the cases cited on the other side the party had so resided.—[*Patteson, J.*—But that was not the case in *Rex v. Darlington (d)*.]—And in that case it was held that no settlement was gained. (Mr. Amos suggested that in *Rex v. Houghton Le Spring (e)*, the residence of the pauper was not a residence as of right, and yet the settlement was gained.) But there the pauper had more than a mere equitable interest, which might never be converted into possession. He had a freehold property in possession, and any residence on that would be sufficient. That case, therefore, does not resemble the present. *Rex v. Berkswell* is the case which is most like the case now before the Court, and by which it must be decided. (The arguments in the case have been confined to the only ground on which the judgment of the Court proceeded.)

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LITTEDALE, J. (*f*).—It appears to me that the widow had in this case an estate sufficient to confer a settlement. The husband being in debt to a considerable amount, devises all his real and personal estate to trustees in trust for sale, and to apply the proceeds therefrom in payment of his debts, and the residue to his widow, to and for her own use and benefit. It appears that the estate in question was mortgaged, and that the mortgage debt, with a considerable arrear of interest, was still a charge upon the estate; and it also appears that the trustees would be glad to sell the estate for the amount of principal and interest, but until the trustees have sold, what is the situation of the parties? The trustees have possessed themselves of the household goods and furniture, cows, horses, waggon, and stock in trade, and *non constat* but that these goods may be of sufficient value to discharge all the testator's debts, and the widow will then have an equitable estate in the residue. As to the residue, it seems to me that she has such an equitable estate in it that her right to it might be enforced. But then it has been urged that the widow did not reside upon the estate; that is true: but she

(a) 4 Dowl. &amp; Ry. 456.

(b) 1 Barn. &amp; Cress. 542.

(c) 1 Har. &amp; Wol. 53; 2 Ad. &amp; El. 536. Court.

(d) 5 Maule &amp; Sel. 493.

(e) 1 East, 247.

(f) Lord Denman, C. J. had left the



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did reside in the parish, and she could not reside upon the estate because the trustees were in the occupation of the estate ; but they were not holding adversely to the widow, for they are her trustees, and they may be compelled to account for all the money they receive in respect of the estate, so that it is the same as if she resided there herself. It is said by Mr. *Clarke*, that the widow would have no right to go into a Court of Equity to compel a conveyance to her of the estate, until the debts were paid, or a sufficient sum tendered for that purpose. Perhaps not; no doubt that is so: but she might get a sufficient sum elsewhere to enable her to make such an application, and until the sale of the realty has been effected, it is impossible to say that she may not have the means of preventing it. What the trustees here have is a power to pay off all debts, and to sell the realty to enable them to do so, but, subject to that power, the equitable estate in the residue is vested in the widow. Most of the cases cited by Mr. *Clarke* have been cases of purchase, which are entirely upon a different footing, and the only case which bears on the present is *The King v. Berkswell*. There a lease of a cottage had been granted for thirty years to one *Hands*, who having resided in it for above a year, died, leaving a widow and three daughters; administration was granted to the widow, but no distribution of the estate was made. After the death of *Hands*, the widow, and by her permission, one of the daughters, with her husband, the pauper, resided in it some years. Lord *Tenterden* (then Mr. Justice *Abbott*) said, "I am clearly of opinion that the pauper had not any such interest as would have enabled him to say, I will come and reside on this property. If the widow of *Hands* had refused to let him do so, a Court of Equity would not have assisted him. The next of kin had not even an equitable interest, but had a mere right to an account." The pauper, therefore, in that case had not any interest at all, he only had a right to have an account; but the widow here has an interest in the whole property, which at any time before sale might be converted into an estate. I consider her as having an equitable estate. With regard to the other question raised upon the case as to the examination of witnesses, the evidence was perfectly immaterial, the widow having the right which she has of going into a Court of Equity.

PATTESON, J.—The question here arises upon the will of a mortgagor in possession. By his will he devised the equity of redemption to trustees for the payment of his debts, and the residue to his wife for her own use and benefit. The question is, whether she takes any equitable estate at all, for the value of the estate is immaterial; and whether, under the 9 *Geo. 1*, she has thereby gained a settlement. *Roper v. Radcliffe* and *The King v. Wivelingham* are in point. The latter perhaps not precisely so, because it appeared there that there was a surplus of personal property after payment of debts; but provided the widow here could pay all the debts, she would be precisely in the same situation as the party was in that case, for she has an equitable interest in the estate itself. But it is said that the estate is not sufficient to answer the debts of the testator. Whether it is so or not is not the question here; but the question is, what estate did the widow take under the will. One circumstance relied upon in this case is, that the widow had not a right to reside on the premises. I do not know whether she had or not, for the trust is not to receive the rents and profits and pay them to her,

but to sell the estate to pay the debts. But it is found in the case that the trustees were in fact occupying as trustees; that the relation of trustee and *cestui que trust* existed between them and her, which is a very material circumstance. The case of *The King v. Geddington* was a case of purchasers, and *Holroyd, J.*, observing upon the relationship of the trustee and *cestui que trust*, says, "If you show that the vendor and vendee stood merely in the relation of trustee and *cestui que trust*, then the latter would have an equitable estate and gain a settlement." These parties come within the latter description, and that makes the difference between the two cases, for there the party was a purchaser, and did not stand in the situation of a *cestui que trust*. Under these circumstances, it appears to me that there was a clear equitable estate in the pauper, and the only remaining question is, whether it is proper to go into the inquiry as to how far the proceeds on the sale of the estate would be sufficient to discharge the incumbrances upon it: as I have already said it does not appear to me proper to go into that inquiry. *The King v. Darlington (a)* differs from this case in many respects, and there no point was ever raised upon the question whether the pauper must reside on the property; a residence in the parish was assumed to be sufficient; but the Court held that the will must be construed not to give the pauper an equitable estate, for if he had taken any such interest the intention of the testator would have been defeated, because whatever he took, he being an uncertificated bankrupt, would have passed to his assignees.

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WILLIAMS, J.—It is too late now to raise the question, whether a person having an equitable estate can gain a settlement. That has long ago been decided in the affirmative, and the only question is, whether in this instance the widow took an equitable estate under the will. It has been objected, that if the estate were sold, and the debts paid off, there would be no residue. But the question is not how affairs may turn out upon inquiry and investigation into them, but what estate does the party take under the will? The devisees here are mere trustees on behalf of the pauper, and she is the person who, in the event of there being any surplus, would be entitled to it. It is clear from the authorities that the devisee of the residue, after payment of debts, may go into a Court of Equity, and at his option pay the debts and have the land; until sale, therefore, he has an equitable estate in the land itself. The evidence offered then as to the value of the estate and the amount of the debts was immaterial. It appears to me that she was entitled to an equitable estate, and resided in the parish so as to gain a settlement. With respect to residence, a party, to gain a settlement by estate, need not reside on the property itself; residing in the same parish is sufficient. Here too the trustees were in fact residing on the property. They were not occupying adversely to the pauper, but as trustees for her. Every thing, therefore, which is necessary to gain a settlement, is found in this case.

Order of Sessions confirmed.

(a) 5 Maule &amp; Sel. 493.

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## The KING v. The Justices of MIDDLESEX.

A party was convicted before two magistrates under the 17 Geo. 3, c. 56, and gave notice of appeal, but did not enter into recognizances to prosecute the appeal and abide the judgment, and was therefore committed for want of entering into such recognizances. When the sessions arrived, he did not proceed with the appeal, and the prosecutor did not move to affirm the conviction. At the end of the sessions he was discharged, the commitment for want of entering into the required recognizances being then satisfied. *Held*, that this Court would not grant a *mandamus* to the convicting magistrates to issue their warrant against the defendant upon the conviction, it being at best doubtful whether, under these circumstances, their jurisdiction was not altogether at an end.

It seems that when the defendant did not proceed with the appeal, the prosecutor ought to have moved the sessions to affirm the conviction.

IN this case one *Richard Nash* had been convicted before two justices, under 17 Geo. 3, c. 56, for purloining and embezzling certain silk manufactures entrusted to him by a master-weaver to prepare and work up for him, &c.; and the conviction set forth that "the said *Richard Nash* is, for his said first offence, adjudged by us to be committed to the *House of Correction* at *Cold Bath Fields*, in the said county, for the space of eleven weeks, there to be kept to hard labour."

A warrant of commitment, reciting the conviction, was made out, but in conclusion it stated, "but the said *Richard Nash* having given to us notice in writing, of his intention to appeal at the next general quarter sessions of the peace to be holden in and for the said county of *Middlesex*, against our said conviction, but not having entered into recognizances with sufficient sureties at the time of giving such notice, pursuant to the statute in that case made and provided, him therefore safely keep in your said custody, until the said next general sessions of the peace (unless such recognizance shall be sooner entered into) or until he shall be discharged by due course of law, and for so doing this shall be your sufficient warrant."

*Nash* did not enter into the required recognizances, he was imprisoned, and at the end of the sessions was discharged from custody under the commitment, for want of entering into these recognizances. A certificate having been obtained from the clerk of the peace, that no appeal had been entered at the next general sessions, application was made to the convicting magistrates to issue their warrant of commitment on their conviction. They refused to do so, and a rule was then obtained, calling on them to show cause why there should not be a *mandamus* commanding to issue their warrant for the apprehension and commitment of *Richard Nash*, pursuant to the conviction made by them under the statute 17 Geo. 3, c. 56.

The 20th section of this statute gives a power to appeal against any conviction of magistrates for offences within the Act, in the following terms:—"And the justices are hereby required to make known to such person, at the time of such conviction, his or her right to appeal at the next general or general quarter sessions of the peace, to be holden for the county, riding, division, city, liberty, town, or place, where such conviction shall have been made, such persons, at the time of such conviction, giving to such justices notice in writing of his or her intention to appeal, and also entering into a recognizance at the time of such notice, with sufficient sureties conditioned to try such appeal, and to abide the judgment of and pay such costs as shall be awarded by the justices at such sessions; but if the person giving such notice of appeal shall not, at the time of giving such notice, enter into recognizances as aforesaid, then the justices to whom such notice of appeal shall have been given, shall and may commit such person or persons to the house of correction or other prison of such county, riding, division, city, liberty, town, or place, there to remain until the said next general or general quarter sessions of the peace to be holden in and for such place, unless such recognizances shall be sooner entered into, and which recognizances the said justices before whom such conviction shall have been made, or any other two or more jus-

tices of the same county, riding, division, city, liberty, town, or place, are hereby empowered and required to take ; and the justices at such sessions are hereby authorized and required, upon due proof made of such notice of appeal, either by acknowledgment of the justices to whom the same shall have been given or otherwise, to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party ; and if, upon the hearing of such appeal, the judgment of the justices before whom the appellant shall have been convicted, shall be affirmed, such appellant shall, within forty-eight hours next after the same shall be so affirmed, suffer such corporal punishment as shall have been directed to be inflicted upon him or her for the offence whereof he or she shall have been convicted, or shall immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said sessions shall award to be paid by him or her, for defraying the expenses sustained by the defendant or defendants in such appeal, or in default of making such payments, shall be committed to the common gaol or house of correction, in the same manner and for the same time, to be computed from the affirmance of such conviction, as shall be directed by the original judgment of conviction, unless the person or persons so convicted shall have been imprisoned under the original conviction, in which case the time for which such person or persons shall have been so confined, shall be included in the order of confirmation."

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*Barstow* showed cause.—The justices here have done all that they are empowered to do. They have no authority to issue a fresh warrant. The party has already been imprisoned, and has been properly discharged.—[*Littledale, J.*—He has not been in custody in execution of the sentence, but only for safe custody.]—The sessions have obtained jurisdiction over the case, and the prosecutor was bound to come and sustain his charge. If he did not come in time, the man was entitled to his discharge. If the sessions had jurisdiction, he has been rightly discharged by their order—if they had not jurisdiction, they had no power to detain him in custody. The notice of appeal brought the conviction before them—*Nash*, the party appealing, was in custody because he could not give recognizances—he was prepared to try the appeal—the prosecutor did not come to support the conviction, and *Nash* was therefore entitled to his discharge, and cannot now be again taken into custody upon a conviction which the prosecutor did not appear to sustain at the sessions. It is not clearly made out to be the duty of the magistrates to issue their warrant, and this Court will not compel them by *mandamus* to exercise an authority, when it is doubtful whether they legally possess it.

*Kelly*, in support of the rule.—The punishment for the offence of which *Nash* was convicted, was in the discretion of the magistrates. They adjudged that he should be imprisoned for eleven weeks, and be kept to hard labour. Their next duty would have been to make out the warrant of commitment for eleven weeks ; but under the 20th section of the statute, the party appealed. He did not, however, enter into the recognizances required by the statute, and the magistrates therefore committed him for want of entering into such recognizances, and for no other cause. When the next quarter sessions arrived, it became the duty of the appellant to take certain steps,

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and without such steps being taken, the sessions could do nothing in the matter. The practice of the *Middlesex* Sessions is stated in the affidavits to be this. The appellant files, within one or two days of the sessions, a petition of appeal, and obtains thereon an order for hearing the same on the appeal day; a copy of which conviction and order is by appointment served on the convicting justices. Nothing of this sort was done here, but that is the default of the party appealing, and he cannot be allowed to take advantage of his own default.—[*Littledale, J.*—If the defendant takes no further notice of the matter, cannot the prosecutor move the affirmance of the judgment, as in the *Exchequer Chamber*?]—There would be no necessity for recognizances on the part of the appellant to appear and try the appeal, if that could be done.—[*Littledale, J.*—Is not his imprisonment for want of entering into recognizances, the same thing as entering into them—then what is the consequence of his afterwards abandoning the appeal?—*Patteson, J.*—The real difficulty is, that the statute has not contemplated that he will not follow up the appeal.]—That is the difficulty, and the term of his imprisonment under the commitment for want of recognizances having expired, the sessions had no right further to imprison him. The case therefore stands now exactly as it did before he gave notice of appeal, and he may be committed on the warrant upon the conviction. The conviction and the commitment are two different things, and the appeal having interposed between the one and the other, and that now being at an end, the convicting justices have the right to make out the commitment upon the conviction.—[*Patteson, J.*—Then how is the allowance to be made as directed by the statute, for the time the party has been imprisoned under the conviction?—He never was imprisoned under the conviction—but only for want of entering into recognizances—he has never been put to hard labour, but has merely been kept in safe custody. He has therefore suffered no imprisonment which can be taken into account.

Lord DENMAN, C. J.—Here is a person duly convicted of the offence of purloining and embezzling silk—an offence for which he might have been committed to prison for three months, and sentenced to hard labour. But when he was convicted, he gave notice of appealing against the conviction. He was required to enter into recognizances to appear and prosecute the appeal, which, however, he did not do. He was for that reason committed to prison. When the time came he did not act upon the notice of appeal, no other proceeding was taken, and at the expiration of the sessions he was discharged from custody. We are now called upon to direct a *mandamus* to the convicting justices, commanding them to issue their warrant to apprehend and imprison him under the original conviction. We must see clearly that the justices are bound to do what we are now asked to order them to do, before we issue any such order. It is doubtful to me, whether they have the power to apprehend this person. The imprisonment for want of recognizances may be considered, in some sense, as part of the execution of the sentence, as the justices have the power to consider it in that light. The only thing that the justices could possibly do under the circumstances of the case, would be to say, that the original sentence should stand; and the question then is, whether they can give effect to such declaration by recommitting the defendant for the time for which he was originally committed. But it seems to me at best doubtful, whether the justices can do any thing of that kind.

I think that they have done all that they have the power to do, and that their authority in this matter is now at an end ; and that they would not have the power to act as is now wished, even if we were to direct them so to do. It is clear, then, that we ought not to direct them to do that which they have no legal power to do, and the rule for the *mandamus* must therefore be discharged.

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LITLEDALE, J.—I am entirely of the same opinion. I think it doubtful whether the justices have the power to act in the way now desired, and we certainly cannot grant a *mandamus* to compel them to do that which would subject them to actions for false imprisonment. The conviction should have been brought before the sessions and affirmed—if it was not affirmed, the justices had not the power to detain the party beyond the end of the sessions, for he was only detained for not entering into recognizances. After this I question very much whether the justices can again commit him, and especially in his absence. It is the practice in this Court not to commit a man unless he is present in Court, and there is a special statute authorizing the judges of assize to make such a commitment, otherwise they could not do it. The whole case is so doubtful, that I think we cannot grant the *mandamus*.

PATTESON, J.—So far as the statute is concerned, this is a *casus omissus*. Nothing can be done without the conviction has been confirmed. The statute at first contemplates that the magistrates before whom the man is brought, shall put the sentence into a course of execution. If he appeals, he is required to enter into recognizances, and if he does so, they have nothing further to do with the matter ; but if he does not, they may commit him for want of entering into recognizances, and that committal may afterwards, in the event of the sentence being confirmed, be taken into consideration as part of the punishment. But all this is only in case there is a confirmation of the sentence by the sessions, and the statute omits altogether what is to be done in case the party does not proceed with the appeal, and in case the sessions do not pronounce judgment upon it. It seems to me that applying to the sessions to confirm the sentence was, in this case, the only mode in which the prosecutor could cure this defect in the statute, and that course he has not thought fit to pursue. The authority of the justices to proceed further is at best doubtful under such circumstances, and I am therefore of opinion that this rule for a *mandamus* cannot be supported.

WILLIAMS, J. concurred.

Rule discharged.

REX v. JOHN WILSON.

IN this case the defendant had been convicted under the 8 Hen. 6, c. 9, upon the complaint of two persons named *Bates* and *Styles*, of a forcible detainer. The conviction was removed into this Court by *certiorari*, and after argument the Court gave judgment to quash the conviction, and the inquisition which had been founded upon it (a). After the judgment had been deli-

Where a conviction on the 8 Hen. 6, c. 9, for a forcible detainer, had been quashed for want of any statement of an unlawful entry, the inquisition taken upon such conviction must also be quashed.

(a) See *ante*, 1 Harr. & Woll. 387.

The magistrates acting under the statute having awarded restitution of the premises, this Court, on quashing the conviction and inquisition, is bound to award re-restitution.

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vered, it was discovered that the rule had applied in terms to the conviction only, and therefore the rule absolute was so drawn up, and the effect of the judgment of the Court was limited to quashing the conviction.

M. D. Hill obtained, in *Michaelmas* Term last, a rule calling on the prosecutors to show cause why the inquisition should not be quashed, and a writ of re-restitution awarded. From the affidavits filed on this and the previous rule, it appeared that *Wilson* claimed the premises as heir-at-law of the last possessor, and *Bates* and *Styles* claimed them under a will. On the 28th of *August*, 1832, they entered during *Wilson's* absence, claiming to take possession; but on his return they were induced to depart, it being agreed that a meeting should be held for a settlement of the dispute. On the 3rd of *Sept.* an information for a forcible detainer was exhibited against *Wilson*, by *Bates* and *Styles*. *Wilson* voluntarily attended before the justices at the Town Hall at *Market-Harborough*, on this information, and the matter was discussed before Messrs. *Griffin* and *Brooke*, the justices then sitting, who heard the complaint and heard witnesses examined in support of it, but who declared that the then proceeding was *ex parte*, and therefore refused to allow *Wilson's* attorney to cross-examine these witnesses, or produce witnesses on *Wilson's* behalf. The magistrates afterwards proceeded to the dwelling-house, part of the premises in dispute, where *Wilson's* wife and family then resided, but from which *Wilson* was at that time absent. The clerk of the attorney for *Bates* and *Styles* accompanied them. The door was fastened, but the wife opened it after a threat had been used that it should be forced. *Wilson* came upon the premises after the magistrates had entered, and upon his saying that he would not give up the premises unless compelled by law, the magistrates ordered a constable to apprehend him. He then served one of them with the following notice—"I do hereby give you notice not to trespass upon the premises in *Market-Harborough* now in my occupation; and further, as I understand you as a magistrate, with your assistants, intend to enter upon the same premises and dispossess me thereof, that I traverse the force alleged to have been used by me, touching the possession of the said premises, and that Messrs. *Styles* and *Bates*, who I hear claim title thereto, never were in possession of the said premises, but that they intruded themselves thereupon when part of my family and my servants were in possession of such premises, and when I myself was attending the funeral of my mother, and stated that they would use force to turn me out, and that I am prepared with evidence to support these facts, and now tender my witnesses to you for examination, and that if after this you dispossess me, or interfere with me in any respect touching the possession of the said premises, you will do so at your peril.

"*John Wilson.*"

Wilson was afterwards brought before the magistrates in custody, when they informed him that they had convicted him on their view of a forcible detainer, and had fined him 5*l.*, and that in default of payment he would be committed to prison. *Wilson* denied the charge of forcible detainer, but they refused at that time to hear any defence; stating, that their own view was sufficient ground for a conviction. *Wilson* then proposed to enter into recognizances to try the validity of the conviction, and pay the fine and costs if it should be confirmed; but the justices refused to accept this offer, and

made out a warrant for his committal. A sheriff's officer was placed upon the premises, but the warrant against *Wilson* himself was not enforced. On the following *Tuesday* an inquisition was held at the *Town Hall*, before Mr. *Griffin*, Mr. *Brooke*, and Mr. *Wetherell*, (a third magistrate who then first took part in the proceedings) for the purpose of trying the traverse tendered by *Wilson*, as to the allegation in the conviction, that he had kept possession of the premises by force. Upon this occasion *Bates* and *Styles* produced the will under which they claimed, and brought evidence of the alleged force; and they also relied on the conviction itself. This production of the conviction in evidence was objected to by *Wilson*, but was admitted by the magistrates. *Wilson* cross-examined the witnesses produced, and also called witnesses of his own to negative the force stated to have been used by him. The information which lay on the magistrate's table at this inquisition, was admitted by them to be the information and complaint upon which they had proceeded. On the part of *Wilson*, this information was objected to, as not alleging that there had been a wrongful entry. The objection was overruled by the justices, and the jury found *Wilson* guilty of an illegal detainer, and the magistrates then directed a restitution of the premises to *Bates* and *Styles*. This direction they indorsed on the inquisition. The inquisition, as returned to the writ of *certiorari* issued in this case, was in the following terms:—

"County of *Leicester* to wit—An inquisition for our Sovereign Lord the King, indented and taken at the *Town Hall* of *Market-Harborough*, in the said county, the 10th day of *September*, in the fourth year of &c. (4 *Will.* 4), by the oaths of twelve good and lawful men of the said county, before the Rev. *Edward Griffin* and *John Wetherell*, Clerks, and *William de Capel Brooke*, Esq., justices &c., assigned &c., who say upon their oaths aforesaid, that *John Wilson* of *Market-Harborough* aforesaid, carpenter, on the 28th day of *August* now last past, into and upon one messuage, with the appurtenances in *Market-Harborough* aforesaid, in the county aforesaid, whereof *Thomas Bates*, of &c., watch-maker, and *John Styles*, of &c., grocer, were then lawfully and peaceably seised to them and their heirs, in their demesne as of fee, unlawfully did enter, and the said *Thomas Bates* and *John Styles*, from the messuage aforesaid, unlawfully ejected, expelled, and amoved, and the said messuage from them, the said *Thomas Bates* and *John Styles*, unlawfully, with strong hand and armed power, did hold and from them detain, and from the 28th *August* now last past, until the day of the taking of this inquisition, with like strong hand and armed power, did keep out, and doth yet keep out, to the great disturbance of the peace &c., and against the form of the statute in such case made and provided.

"We, whose names are hereunto set, being the jurors aforesaid, do, upon the evidence now produced before us, find the inquisition aforesaid true.

"Signed, &c."

Upon the above inquisition, the following memorandum of restitution was indorsed.

"County of *Leicester*.—Be it remembered that we, *Edward Griffin* and *John Wetherell*, Clerks, and *William de Capel Brooke*, Esq., justices, in the within inquisition named, did this 10th day of *September*, in the year &c., personally go to the messuage and other the premises in the within written inquisition mentioned, and did reseize the same with the appurtenances, and

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did put the within-named *Thomas Bates* and *John Styles* into full possession thereof, according as they, before the entry and forcible detainer thereof by *John Wilson*, in the said inquisition mentioned, were seised according to the statute in such case made and provided. Given under our hands and seals.

“Signed and sealed, &c.”

Sir *W. Follett* showed cause against the rule for quashing the inquisition.—The great question here is, whether, under the statute of *Henry 6*, the party was liable to be convicted of a forcible detainer, without proof that he had made a wrongful or unlawful entry. The conviction here has been held bad (a); but the judgment then given cannot affect the inquisition, which is perfectly sufficient.—[*Patteson, J.*—It was assumed at that time, that the inquisition was founded on the conviction.]—In *Rex v. Oakley* (b), it is true that Mr. Justice *Parke* doubted whether the original entry must not have been unlawful, in order to give the magistrates jurisdiction. But those doubts were considered in the former discussion of this case, and were not treated as of very great weight (c). The conviction however may be bad for the want of a statement that the entry was unlawful; but the inquisition is, nevertheless, good, for it distinctly states that *Wilson*, on the 28th of *August*, “unlawfully did enter,” and unlawfully expelled *Bates* and *Styles*, and with a strong hand did detain &c., and the justices therefore award restitution. Their right to do this depends on the statutes 15 *Richard 2*, c. 2, and 8 *Hen. 6*, c. 9. The first of these statutes gives the justices jurisdiction on a forcible entry alone; and not to any other authority but that of the justices is such jurisdiction confided. The next statute, 8 *Hen. 6*, c. 9, extends the power of the justices to wrongful entries, or to forcible detainers, where the original entry has been wrongful, though effected peaceably. This last statute authorizes the justices, after inquisition by a jury, to re-seize the premises. The proceedings in this case were perfectly regular under the third section of this last statute, and the first part of the rule is therefore answered. As to the last part of the rule, it is clear that the statute does not give this Court jurisdiction to award re-restitution against the order of the justices. But if this Court is to proceed on its common law authority, then it will require proof that the parties claiming its aid have acted *bonâ fide*. In *Russel on Crimes* (d), it is said that the Court of *King's Bench* has such a discretionary power over this matter, upon an equitable construction of the statute, that if the restitution appears to have been ill executed, this Court will set it aside and award re-restitution; but it will not do this till it appears that the party claiming such re-restitution has good right thereto. It is discretionary in this Court to grant re-restitution where the restitution has not been tortious; *Rex v. Harris* (e). The affidavits clearly show that it has not been tortious in this case, and the Court may therefore refuse the re-restitution. If the defendant here really has right to the premises, he may assert his right in a proceeding by ejectment.

Hill, contrâ.—This rule can be supported as to both its parts. The judg-

(a) 1 *Harr. & Woll.* 387.
 (b) 4 *Barn. & Ad.* 307.
 (c) See the judgment of the Court, 1 *Harr. & Woll.* 388—390. By a typographical error

the name of the learned judge is printed *Park*, instead of *Parke*.
 (d) *Völ.* 1, 293.
 (e) 1 *Lord Raym.* 482.

ment of the Court on the former occasion was intended to affect both the conviction and the inquisition; but it being found that the rule related in form only to the conviction, the judgment of the Court was necessarily confined to that. The inquisition here is merely ancillary to the conviction—it is the mere trial of a traverse arising out of the conviction. The conviction being bad, the inquisition which is founded on it must also be bad. This is not a summary conviction in the legal meaning of that term, as used at the present time. Until the 33 *Henry* 8, c. 6, justices out of sessions could convict only on confession, or on view, and their conviction was traversable; *Paley* on Convictions (a). And if it was traversed, they were obliged, according to the authority of *Hawkins*, to call in a jury to try the traverse. *Regina v. Layton* (b) was supposed in the former judgment in this case not to have been brought to a conclusion, but in fact it was: the conviction there was confirmed, there having been a valid complaint in the first instance, and no traverse taken on the finding. The affirmance of the conviction may be found in *Fortescue* (c). That case, however, distinctly shows that the point on which the conviction proceeds may be made the subject of an issue, if a traverse of the force is tendered at the time of the conviction. The inquisition here does not recite the complaint, and so does not give the justices jurisdiction. Two proceedings here might have been taken, one of a criminal nature where fine and imprisonment might be awarded, the other of a civil nature for the recovery of the premises. It lies on the other side to show that the jury was summoned upon the complaint of the party that he had been wrongfully dispossessed, and for the purpose of giving him the civil remedy.—[*Patteson*, J.—Lord *Holt* says, that the complaint is a necessary part of the conviction, but not of an inquisition or an indictment].—But it ought to appear on the face of the inquisition.—[*Patteson*, J.—No; that is part of the finding of the jury, but the complaint is not so.].—Both the proceedings here appear to be upon the view, for the words “on the view” override the whole.—[*Patteson*, J.—The second section of the 8 *Hen.* 6, says, that on complaint made by the party grieved, the justices shall go to the place; and the third section says, that though the party may have departed before the justices come there, they may inquire by the people of the county, so that they must go to the place before they summon the jury.].—That is so, and the object of going and summoning the jury is to get a conviction on the complaint. It is necessary therefore that the complaint should be set out. The forms of the conviction and inquisition used in this case, have been held bad in *Rex v. Elwell* (d). The authorities cited as to the discretion of this Court to award re-restitution, may be admitted, and then the affidavits here show that this is a case in which the Court will exercise its discretion in favour of this defendant.

Sir *W. Follett*, in reply.—The forms of the conviction and inquisition are those which are given in *Burn* (e). There is no necessity for the statement of a complaint, for the inquisition was in fact a trial of the truth of a traverse contained in a written notice, of which both parties were aware.

Cur. adv. vult.

(a) *Introd.* p. xxix.

(b) 1 *Salk.* 106—353.

(c) *Fort.* Rep. 173.

(d) 2 *Lord Raym.* 1514.

(e) *Burn's Justice*, tit. *Forcible Entry and Detainer*, p. 230.

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Lord DENMAN, C. J., in the same term (*June 13*), delivered the judgment of the Court.

In this case, which has been before the Court on a former occasion, we have been moved to quash an inquisition and award a writ of re-restitution, in pursuance of our former judgment, which set aside the conviction of the defendant by magistrates for the offence of a forcible entry, and in which we expressed an opinion that the inquisition founded upon it must also be set aside. The grounds of that judgment were fully stated, and have not been questioned in the argument on this rule; but it was said, however defective the conviction might be, the inquisition being the act of a jury regularly brought together, and the result of an examination of witnesses at which both parties assisted, ought not to be set aside. We are however of opinion, that as the inquisition was founded upon the conviction, which turns out to be a complete nullity, for reasons which it is unnecessary now to repeat, the inquisition also is a proceeding without any warrant of law, and must be set aside. Whether it may have effect as evidence in other controversies between the parties, we need not consider now. But indeed the inquisition is in every other respect wholly inoperative, its use being to give effect to a conviction, which is of course impossible, where the conviction itself is void. If it could be permitted to stand as a part of the proceedings, it would appear to justify the transfer of the possession worked by the conviction; when the conviction itself is given up as indefensible, this cannot be permitted. And the inquisition, if taken by itself without reference to the conviction, is in itself defective, inasmuch as it does not show that any complaint had been made, nor by what authority or on what account the jurors were summoned. But the defendant would gain nothing by our judgment, if we should merely declare the proceedings null. Another step is necessary on the part of the Court in order that full justice may be done him. If we allow him to remain dispossessed of the premises he before held, full effect will be given to an act which we have pronounced wrongful. A writ of re-restitution is prayed to prevent this consequence, and the original complainant has stated his objections to our awarding that writ. On looking into the authorities (a) we find that the Court has been in the habit of awarding that writ, when it has quashed the conviction for forcible entry, otherwise the whole proceedings here would be nugatory, and the practice is said to have grown out of an equitable construction of the statute. It has been said, that the Court will not do this, unless the party unlawfully dispossessed should appear to have title to the premises—a most inconvenient inquiry upon affidavit, and a course full of danger to the public peace, as protecting the execution of an unlawful sentence. But in *Rex v. Jones* (b), the Court declared, even where the conviction was quashed for a merely technical error, and the lease of the dispossessed person had expired during the litigation, “that they had no discretionary power in the case, but were bound to award restitution on quashing the conviction.”

This rule, therefore, for quashing the inquisition must be made absolute, and re-restitution will also be awarded.

Rule accordingly.

(a) 1 Hawk. P.C. b. 1, c. 64, s. 65, 66;
 13 Vin. Abr. 392, title *Forcible Entry* and

Detainer; Bac. Abr. *Forcible Entry and Detainer*.

(b) 1 Stra. 474.

EVANS v. ELLIOTT and PATRICK.

REPLEVIN. The declaration stated that the defendants took the cattle of the plaintiff, and unjustly detained the same against sureties and pledges until &c. *Avowry* by *Elliott* and cognizance by *Patrick* in the usual form, avowing and acknowledging the taking of the cattle for 27*l.*, being half a year's rent due to *Elliott* on a demise by him to the plaintiff. *Plea in bar*,—that after the taking of the cattle, and before the impounding thereof, to wit, on &c., the plaintiff tendered to *Patrick*, who was then duly authorized to receive the said rent &c., the said sum of 27*l.* 10*s.* so due for rent, as in the said avowry and cognizance mentioned, together with 5*l.* for the costs and taking of the said distress, that sum being reasonable and sufficient for the costs and expenses in that behalf; which several sums respectively *Patrick* then wholly refused to accept, and afterwards unjustly detained the said cattle against sureties and pledges until &c., in manner and form as the plaintiff has above thereof complained. *Verification, &c.* *Demurrer* to plea in bar, stating for cause, that it does not traverse or sufficiently confess and avoid the several matters in the avowry and cognizance above set forth in this, to wit, that the said plea is pleaded to the whole of the avowry and cognizance, and contains matter in answer to only part thereof, inasmuch as the matters contained and set forth in the said plea in answer to the said avowry and cognizance, avowing and acknowledging the taking and detaining stated in the declaration, do not show that the taking stated in the declaration was not just. *Joinder* in demurrer.

Where a landlord seized goods as a distress for rent, and after the distress payment of the rent was tendered but refused, the tenant may maintain replevin in respect of the unlawful detainer.

Declaration in replevin in the common form. The avowry justified the taking of the goods for rent; the plea in bar stated, that after the distress, and before the impounding, a tender of the rent was made and refused, and the goods were detained, as in the declaration stated:—*Held*, that this was no departure, the detention after tender made being a new taking.

Evans, in support of the demurrer.—The plea in bar is no answer to the avowry, but is a departure. The proceeding here should have been detainue, not replevin. In the *Second Institute* (a) it is said, "Before the distress, the tenant may upon the land tender the arrearages, and if after that a distress be taken, it is wrongful; and if the lord had distrained, if the tenant, before the impounding of them, tender the arrearages, the lord ought to deliver the distress; and if he doth not, the detainer is unlawful." This rule is adopted in the *Six Carpenters'* case (b). In *Selwyn's Nisi Prius* (c), it is said, "If distress has been made, and, before impounding, the arrears are tendered, then the detainer only is unlawful, and the tenant must bring detainue." Here the plea in bar simply goes to the detainer, and the taking being justified by the avowry and cognizance, the replication does not touch the justification.—[*Patteson, J.*—The declaration is for taking and unjustly detaining; the avowry only justifies the taking; perhaps the defendant might have gone on and justified the detaining also.]—The authorities show that the justification here is sufficient, and the rule already stated holds in the case of a taking damage feasant.

V. Williams, contra.—The argument on the other side proceeds on a fallacy. It is clear that replevin lies under the circumstances of this case. In *Fitzherbert's Natura Brevium* (d) it is said, "If a man take cattle for

(a) 2 Inst. 107.
(b) 8 Rep. 146.

(c) 7th edit. p. 1200.
(d) 159, (G).

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damage feasant, and the other tenders amends, and he refuseth it, now if he sueth a replevin for the cattle, he shall recover damages only for the detaining of them, and not for the taking of them, for that the same was lawful."—[*Patteson*, J.—That is on the assumption that the replevin is brought for the detainer only.]—In *Viner's Abridgment* (a) there is a passage to the same effect; and in *Gilbert on Distresses* (b) it is said, "Where the lord impounds the beasts notwithstanding the sufficient tender of the tenant, the tenant hath no way to recover his cattle but by his writ of replevin." In *Allen v. Bayley* (c) the pleadings were similar to the present, and the objection taken was, that it was not expressly alleged that the tender was before the impounding; but the Court held that it was sufficiently stated, and treated this form of action as the only proper one under the circumstances. In *Pilkington v. Hastings* (d) replevin was brought for an unlawful detainer of this sort, and the proceeding was never questioned, though every possible objection was raised in that case; and in the *Six Carpenters'* case (e) it is said, "So if a man take cattle damage feasant, and the other offers sufficient amends, and he refuses to deliver them, now if he sues a replevin he shall recover damages only for the detaining of them, and not for the taking, for that was lawful." The last authority is that of *Anson v. Shore* (f). That was a special action on the case for detaining the plaintiff's cattle after a tender of amends; an objection was taken by Chief Justice *Mansfield* as to the form of the action, who said, "that by suing out a replevin the plaintiff might have got the beasts back into his custody almost immediately after they were impounded;" and this holding was afterwards confirmed by the Court (g). There has been no informality in the pleadings here. The form of the writ of replevin is, that the party took and detained the cattle. The declaration must follow the writ. The plea in bar is only explanatory of the declaration. If a proper tender is made, and the landlord refuses it, he makes himself a trespasser as well as a wrongful detainer; *Virtue v. Beasley* (h). That case clearly establishes that an unlawful detainer is to be treated as an unlawful taking. This plea in bar is like a replication in the nature of a new assignment; *Greene v. Jones* (i). If the unlawful detainer arises from a lawful taking, still the avowant is not entitled to judgment on the demurrer, on the assumption that that avowry is an answer to the whole charge. It is clear, first, that this action lies; and secondly, that where this action is brought under circumstances like the present, it is not necessary that the pleadings should assume a new shape, but that, this being an ordinary case of replevin, the pleadings are to be in the ordinary form.

J. Evans, in reply. The plea in bar itself raises the distinction between the taking and detaining, for it alleges a tender after the taking and before the impounding. The argument on the other side goes to show, if it is worth any thing, that trespass would lie for detaining goods after a tender of amends—a position which cannot be supported.

(a) *Tit. Tender* (S), pl. 1.

(b) 2d edit. p. 63.

(c) 2 *Lutw.* 1594.

(d) *Cro. Eliz.* 813.

(e) 8 *Rep.* 146.

(f) 1 *Camp.* 285.

(g) 1 *Taunt.* 261; see also *Sheriff v. James*, 1 *Bing.* 341.

(h) 1 *Moo. & Rob.* 21.

(i) 1 *Wms. Saund.* 299, n. 6.

LORD DENMAN, C. J.—It appears to me that this is a very critical objection. I think that the plea in bar is well enough. If every continuance of a trespass is, as we know it is, a new trespass, then every detention must be a new taking. After the tender made, the detention clearly was a new taking. The word “taking” has not such a technical sense as that it cannot be applied in this manner.

LITTLEDALE, J.—I am of the same opinion. The detaining after the tender was sufficient to satisfy the words of the declaration as to the taking.

PATTESON, J.—The authorities cited by Mr. *Williams* are amply sufficient to show that replevin will lie for the detention, and that is the real question here.

WILLIAMS, J. concurred.

Judgment for the plaintiff.

PAINTER v. The LIVERPOOL Oil Gas Light Company.

TROVER for coaches, horses, and harness.—Plea, justifying under the 4th Geo. 4, c. 39 (a), alleging that the plaintiff, after the passing of the said act for lighting the town of *Liverpool* with oil gas, and before the time when &c., to wit, &c., was indebted to the defendants in a large sum, to wit, &c., for gas supplied by contract, and that afterwards, and while the plaintiff was so indebted, to wit, &c., *William Henry Parkinson* the collector for the defendants, left at the place of business of the plaintiff a demand in writing of the said sum so due and owing from him to the said defendants; and afterwards, and more than ten days after the leaving of the said demand at the said place of business of the plaintiff, as aforesaid, he the said *W. H. P.* then being such collector, and so acting under the authority of the said defendants as aforesaid, to wit, on &c., preferred a complaint against the plaintiff for the premises aforesaid, before *James Aspinall*, then being one of

Justices authorized by an act of parliament to proceed by warrant in execution, to enforce payment of rent to a company for gas supplied by that company, ought not to do so without a previous summons to the party against whom the warrant is to be issued.

Persons applying under such a statute for a warrant, and who by themselves or their officer afterwards execute it, cannot set up the warrant as their justification, in an action of trespass brought against them by the party whose goods have been seized under it.

It seems that the warrant ought to state the demand of the rent, and the summons and hearing on which the conviction proceeded.

(a) 4 Geo. 4, c. 39, (local and personal, public) s. 72, enacts, “That in case any party or parties, who shall contract with the said company, or agree to take, use, or enjoy, the benefit of the said gas, shall refuse or neglect, after the space of ten days after demand made or left in writing at the place or places of abode or business of such party or parties, to pay the rents, or sum or sums of money then due for such gas, to the said company, according to the terms and stipulations of the said company, it shall be lawful for the said company to separate his gas pipes from their mains; and that the rent or rents, sum or sums of money then due from any such party or parties to the said company, for such gas, as also any other rent or rents, sum or sums of money due or owing to the said company for gas supplied by them to any person or persons, shall and may be recovered by the said company, or their clerk or superintendant, or any person or persons acting under their authority, by warrant under the hand and seal

of any justice of the peace for the said town of *Liverpool*, or county of *Lancaster* (as the case may require), and it shall be lawful for the said company, or their clerk or superintendant, or any person or persons acting under their authority, with such warrant to levy the said sum or sums so due and owing as aforesaid, by distress and sale of the goods and chattels of the party or parties so neglecting or refusing to pay the same, rendering the overplus, if any, to such party or parties, after deducting the necessary charges of such distress and sale; or the same may be recovered in the Borough Court of *Liverpool*, or in any of his Majesty’s courts of record in *England*, by action of debt, or on the case, bill, plaint, or information, &c.”

By section 74, any person thinking himself aggrieved by any rule, bye-law, or order of the said company, or any thing done in pursuance thereof, or by the order or determination of any justice or justices of the peace, in pursuance of this act, may appeal to the sessions.

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his Majesty's justices of the peace in and for the said county of *Lancaster*, and thereupon afterwards the said *J. Aspinall*, so being such justice for the said county as aforesaid, and before the said several times when &c., to wit, on &c., according to the form of the statute in such case &c., duly made and caused a certain warrant under his hand and seal, directed to the sub-bailiffs, head constables, and assistant constables, in and for the borough of *Liverpool*, and also to the said *William Henry Parkinson* and *John Hampson*, and their assistants, and thereby then authorized and commanded them, every or any of them, that upon the goods and chattels of the said plaintiff they should levy the said sum of 12*l.* 18*s.*, for that he being a person who had contracted with the said defendants to take the benefit of the gas from the said defendants, did refuse and neglect, after demand left in writing at the place of business of the said plaintiff, to wit, on &c., to pay the sum of 12*l.* 18*s.*, being the rent due to the said defendants from the said plaintiff, for gas consumed by the plaintiff, contrary to the form of the statute &c., whereof he the said plaintiff was duly convicted, and for the levying thereof they were to seize, take, and carry away the said goods and chattels, and if, in five days after such seizure, the said sum of 12*l.* 18*s.*, together with the reasonable charges, &c., should not be paid, then and in such case, after the expiration of the said five days, they were to make sale thereof, or of so much thereof as should be sufficient to levy the said sum, &c. The plea then stated, that *Parkinson* being so clerk, and acting under the authority of the defendants, did seize, take, and carry away, under and by virtue of the said warrant, certain goods and chattels of the plaintiff, being the goods and chattels in the declaration mentioned, for the purpose of levying the said sum, &c., and did afterwards, and more than five days after such seizure, to wit, on &c., sell &c., for the purpose of satisfying and discharging the said sum.

Replication.—That the plaintiff was not, at any time before the said *James Aspinall* made the said warrant in the said plea mentioned, summoned or warned to answer the said complaint of the said *W. H. Parkinson* against the plaintiff, for the said supposed debt, before the said *James Aspinall*, or any other of his Majesty's justices of the peace; nor did he before then have any notice of such complaint, nor did he appear before the said *James Aspinall*, or any other of his Majesty's justices of the peace, or any officer or person whatever, authorized or empowered to hear the said complaint, to answer the said complaint; and the said warrant was made and issued against him, as aforesaid, without his having had any means or opportunity to hear or answer the said complaint; wherefore the defendants, of their own wrong, &c.

Rejoinder.—That the gas was supplied after the passing of the act, and that *Parkinson*, as such collector, &c., left a demand in writing at the place of business of the said plaintiff, thereby requiring him to pay the said sum, &c., so due and owing from the said plaintiff to the said defendants, as in the said last plea mentioned. Conclusion to the country.

Demurrer.—Because the rejoinder neither confesses nor avoids, nor traverses nor denies, the matter of the replication; and because it tenders an immaterial issue. *Joinder*.

Wightman, in support of the demurrer.—The point intended to be raised here is, that a summons ought to have been issued, calling on the party to appear before the justices, and to show cause against the demand, previously

to any execution issuing against him ; and that unless there are some prohibitory words in a statute, rendering such summons wholly unnecessary, it must be issued. The party called on to pay may have some sufficient excuse for not paying, of which he cannot avail himself if he is not summoned before the justice.—[Lord Denman, C. J.—This Court has often refused to grant a *mandamus* to justices, to issue a warrant in cases where no summons had been previously served on the party.]—And that is the principle adopted in *Rex v. Justices of Stafford* (a), which was in conformity with *Rex v. Benn* (b). —[Lord Denman, C. J.—We have no doubt that that is the just and reasonable course, you have to show that it is essential.]—All the authorities, and even the words of this act, show that it is so. The act gives the company the option of proceeding in this summary way, or before the Borough Court, or by action in a Court of record. In any of these cases, the party against whom the claim is made must be heard in his defence. There is no authority in the statute for the justice proceeding to issue his warrant, without summons, and without hearing the party.—[*Littledale, J.*—The warrant of distress here does not even say that the demand had been left at the house ten days before the warrant was issued.]—It does not.—[*Littledale, J.*—But the rejoinder states the demand and non-payment after ten days.]—For the purpose of the present argument, the rejoinder may be dismissed from the consideration of the Court. The 73rd section of the act speaks of an order or determination of the justice, and gives an appeal against it—there can be no order or determination without a hearing. The act does not prescribe the exact manner in which the company shall conduct the suit, nor how it shall procure a warrant, but in each case it must of course be according to law. This act does not go further than the 43 *Eliz.*, nor are its provisions more strict than those for the summary recovery of the poor's rate.—[Lord Denman, C. J. —As there is nothing laid down in the statute as to what must be done in order to render the warrant lawful, you must resort to the general principle to show that this warrant could not be lawful without a summons and hearing.]—That principle is perfectly clear, and there is nothing in this statute to show that this company is to be excused from conforming to it. In *Rex v. Benn*, Lord Kenyon said, “the payment of a poor-rate, unless it be set aside, must be enforced ; but a summons must precede a warrant of distress, which is in the nature of an execution. It is an invariable maxim of our law, that no man shall be punished before he has had an opportunity of being heard ; whereas, if a warrant of distress were to be issued without any previous summons, the party would have no opportunity of showing why execution should not be had against him.” The case of *Rex v. Staffordshire*, which proceeded on the same principle, related to a local act of parliament. —[Lord Denman, C. J. —We did not mean in that case to lay down any general rule on the subject, but merely to say, that under the particular circumstances existing there, we did not think it fit that a *mandamus* should issue.]—Still the principle of law is clear, that a man cannot be condemned without being heard, and there are many authorities to show that a summons must precede a warrant.

Conling, contra.—The proceedings taken here are valid, even without a summons. The sole question here is, whether what was done, was within

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(a) 1 Harr. & Woll. 328 ; 5 Nev. & Man. 3 Ad. & El. 425.  
 94 ; S. C. nom. *Rex v. Hughes and Rogers*, (b) 6 Term Rep. 198.



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the jurisdiction of the magistrates. It is clear that it was so. Then it is equally clear that the want of a summons would only make the proceedings erroneous, not void, and consequently they afford a sufficient justification to any person who has acted under them. In the case of the *Marshalsea* (a), this distinction will be found to be recognized. It was there resolved that (b) "a difference was to be taken when a Court has jurisdiction of a cause, and proceeds *inverso ordine*, or erroneously; there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But when a Court has no jurisdiction of the cause, there the whole proceeding is *coram non judice*, and actions will lie against them, without any regard of the precept or process." The present case falls within the first part of the rule, and the act done here, having been done under process from justices who had jurisdiction, cannot now be questioned. In *Webb v. Batchelour* (c), the plaintiff, a clergyman, brought trespass for taking his cows. The defendants justified under a warrant issued to enforce statute duty on the highway. This very objection was raised, that the plaintiffs had not been summoned and heard; but the Court held, that the matter being within the jurisdiction of the justices, though they had acted erroneously in not summoning the party, yet the defendants, who acted under their warrant, were justified. It must not be assumed in this case, that the man could have had a good excuse for not paying; but if that is assumed, then the answer is to be found in the observation of Lord Chief Justice Hale, in the case last cited (d), "You might have gone to the justice, though after the distress, before it was sold, if you had any excuse."—[*Littledale, J.*—How could the party have been relieved by doing that? Who was the justice to relieve him?—He could have been relieved by the justice making an order for the goods to be restored. Where the proceeding has been erroneous, the conviction may be set aside, as in *The Queen v. Dyer* (e), where the party was summoned for an impossible day; but there *Powell, J.* said, that if an action was brought against an officer for executing this conviction, it would not lie, "for an erroneous conviction would justify him." The principle of these cases has been most fully recognized in *Ackerley v. Parkinson* (f), where the vicar-general of the bishop was held to be justified in having pronounced an excommunication for contumacy, though the citation on which it proceeded afterwards proved to be void, and the proceedings thereupon had were subsequently set aside upon appeal—the vicar-general having properly jurisdiction in the matter.—[*Patteson, J.*—But the distinction between all those cases and the present is, that this is not an action against parties acting under the warrant, but against the company who first set the justices in motion.]—Then there is a good defence under the general issue. The defendants in *Webb v. Batchelour*, were the parties who had procured the warrant. To maintain trover, a conversion is necessary, and here there is no conversion but what took place under the warrant. The meaning of the legislature was, that the company should have the same rights as a landlord would have for the recovery of rent in arrear, and the only reason for introducing the justices at all was, that where there were so many tenants,

(a) 10 Rep. 68.

(b) Id. 76 a.

(c) 1 Ventr. 273; Freem. 396, 407—488;  
and 3 Keb. 476—507.

(d) Freem. 490.

(e) 6 Mod. 41.

(f) 3 Maule & Selw. 411.

the direct exercise of a landlord's power, without the intervention of a justice, might lead to a breach of the peace. If the justice here has acted ministerially, no action will lie against him, for he was not bound to summon the party; if he has acted judicially, the proceedings are merely erroneous, and the parties acting under his warrant have a good justification.

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*Wightman*, in reply.—It may be admitted, that in ordinary circumstances, trespass would not lie against justices for any thing done by them judicially, if it was merely erroneous. But that is not the case here. The action here is not against the justices, nor against their officer, acting merely in obedience to the warrant but against the parties who applied for and then executed the warrant. That warrant is bad upon the face of it, and *Groome v. Forrester* (a) shows that when it is so, even the justices themselves may be answerable in trespass, though the matter on which they have decided was within their jurisdiction. The defendants here were the plaintiffs in the original suit before the justices; they come therefore within the rule laid down in *Parsons v. Lloyd* (b), where a *capias* being void, trespass was held to lie against the plaintiff in the original action, who had caused it to be executed. Lord Chief Justice *De Grey* said there (c), "The defendant in the original action has been greatly injured. He is entitled to a remedy somewhere—but not against the sheriff or his officers, who are bound to obey the writ issued under the sanction of the Court. The officer not being liable, the plaintiff must be. He has procured the writ to be sued out, and is answerable for all its consequences." The present case is strictly within the analogy of the one cited.

Lord DENMAN, C. J.—The first question in this case is, whether the warrant set out in the plea is a good justification to any person who acted under it in taking the goods of the party charged with being a defaulter in the payment of his rent. It is said to be so under the 72nd section of the statute 4 Geo. 4, c. 39, by which the magistrates are authorized to issue their warrant, in case of neglect or refusal to pay the company the rent due for the use of the company's gas. In order to decide this point we must consider, upon general principles, whether justices authorized by the statute to proceed by warrant in execution may do so without a previous summons to the party against whom the warrant is to be directed. No case as yet has furnished an express authority on this subject, for although Lord *Kenyon* intimated an opinion upon it in *Rex v. Benn* (d), it was not necessary, for the decision which the Court there came to, that this point should be determined. But in the present case I am of opinion that the warrant ought not to have been issued but upon a previous summons. The warrant states that the plaintiff having contracted with the defendants for a supply of gas from them, refused, after demand made in writing, to pay the rent due to them for gas consumed by him, whereof he was duly convicted. The very terms of this warrant, referring to a contract and to a non-performance of it, make it evident that the party ought to have been summoned to show either that he had not refused to pay, or that he had an excuse for not paying. We are therefore called upon by the general principles of the law on which we are bound to act, to say that this warrant is illegal, because the party against whom it issued had

(a) 5 Maule & Sel. 314.

(b) 2 Sir W. Bl. 845.

(c) Id. 846-7.

(d) 6 Term Rep. 198.

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no opportunity given him of showing whether he was duly liable to be treated as a defaulter under this statute. But then it is said that a warrant may be illegal in itself, and yet furnish a full justification to the officers who act under it: that they are bound to obey it, and that they cannot canvass its correctness. It is true that an officer is bound by his duty to execute a warrant which is directed to him; that he cannot pause in the execution of it till he is satisfied that the judge who issued it has acted exactly in conformity with all the requisites of the law; and it is equally true that an officer acting under a warrant in discharge of his duty as an officer, will be protected by that warrant. Acts of parliament have been passed for the protection of officers founded on this principle, and it is a just one; for it would be absurd that an officer charged with the execution of a warrant should have to consider, before he executed it, whether it was regularly issued or not. But here the parties relying on the warrant are not officers acting under it; it is not even the clerk of the company who justifies, but the directors themselves, who allege that their clerk, acting under their authority and by their command, took the goods by virtue of the warrant. The case, therefore, is like those where the question has been, not whether an officer was justified, but whether the parties who set him in motion were justified. It appears to me that the defendants here are not in a condition to justify. The decision in *Webb v. Batchelour (a)* does not apply to this case, for the principle there laid down was, that an officer is not liable for executing an irregular warrant; a doctrine also stated by Mr. Baron *Powell*, in *Gwinne v. Poole (b)*, where he said, that if it was otherwise it would be to make the constable more knowing than the justice. Those cases would have resembled the present if the defendants there had been parties intervening between the magistrates and the officer, and justifying themselves for employing the officer to act. It appears to me that if a third person takes upon himself to direct a constable to act, he also takes upon himself to make out a good defence for what has been done. The defendants have failed in doing that in this case, and the plaintiff is therefore entitled to judgment.

LITLEDALE, J.—I am of opinion that it was necessary, in order to render this warrant available, that a summons should have issued in the first instance. The case is like *Rex v. Benn (c)*, which was upon the statute 43 *Eliz. c. 2*. The fourth section of that statute empowers justices by their warrant to levy the poor rate upon every one that shall refuse to contribute, by which a refusal before justices appears to be more clearly pointed out than in the early part of this statute of the 4 *Geo. 4, c. 39, s. 72*, where it is said, that if any party shall refuse or neglect, after the space of ten days after the demand in writing, to pay the company's rents, they may be recovered by warrant of a justice; though it may be observed, that in the part of the section which immediately follows the mention of proceedings before the justice, the words "so neglecting or refusing to pay," occur again. And the operation of both statutes in this respect ought to be the same. In the case of malicious injuries, punishable by summary conviction under statute 7 & 8 *Geo. 4, c. 30*, a justice is empowered by section 30, on a charge being made before him, to issue his warrant for apprehending the party charged without

(a) 1 Vent. 273; Freem. 396, 407, 457, 488.

(b) 2 Lutw. 935, 1560.

(c) 6 Term Rep. 198.

previous summons, but that is in the nature of a criminal proceeding; and the warrant there issues not for the purpose of levying a fine on the defendant, but only for the purpose of bringing him before the justice. The warrant here is in the nature not of mesne process, but of an execution, and both upon the principle stated in *Rex v. Benn* (a); and in common justice, such execution ought not to issue without a hearing of the party. Without a summons the party has no opportunity of going to the justice. When the demand is made, he can only apply to the gas company themselves, for at that time at least no summons from a justice has issued. As to the legality of the warrant, therefore, I think that it ought not to have been granted without a summons. Then as to the protection claimed by these defendants, it is true, that according to *Webb v. Batchelour* (b), an officer in a case like this would be protected, because it does not belong to him to say, "there is an error in the proceedings, therefore I will not execute the warrant." But this is an action against the directors themselves; they are the persons who put *Parkinson*, the collector, in motion, and cause him to demand the rent and seize the goods. It is not he that justifies, but they who allege that he acted under their authority; they adopt the warrant, and they identify themselves with him throughout the transaction. It was their duty then to see that the warrant was a proper one, and as for want of a summons, it is not so, the judgment must be against them.

PATTESON, J.—The first question here is, whether the warrant is bad upon the face of it. I have not the least doubt on that subject, on the words of this particular act of parliament. It is not necessary to determine what would be a good warrant on every other act of parliament. The statute of *Elizabeth*, and that now in question, are not analogous to each other in all respects, as perhaps no two acts are; but it is sufficient to say, that on the face of this act there is not the slightest doubt in the world that the party ought to have been summoned before a warrant was granted against him. There are many clauses in this act providing for the recovery of penalties and damages by summary proceedings before justices, and authorizing them to issue warrants for levying the sums to be recovered. Scarcely any two of them agree in their terms, and in none of them is a summons mentioned except in sec. 70, which relates to compensation for damage done to lamps. It cannot be supposed that the legislature meant the justices to proceed upon summons in that case only; and if in others, why not in this? Taking all the provisions together, the intention evidently is, that the justices should issue their warrant for the recovery of these rents after the proper steps have been taken, and not otherwise. The question raised by the defendants comes to this, whether the proceeding of the justices was judicial or ministerial; if it be judicial, the justices cannot have issued their warrant without having determined some point, and that should have been upon hearing the parties. Mr. *Cowling* says, that the party distrained upon may apply to the justices after the distress, but that is not a satisfactory answer, for the goods may be sold immediately; and though in this particular case the justice granted five days, yet that was in his discretion; the act says nothing of any time to be given; and although the justice in this case here did make the allowance of that space of time, the mere circumstance of his having done so does not alter

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(a) 6 Term Rep. 198.

(b) 1 Vent. 273; Freem. 396, 407, 457, 488.

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the rights of the parties. In the case of *Webb v. Batchelour* (a), it was assumed throughout that the warrant was bad for want of a previous summons. It is true that the particular case arose under a statute which contained the words "not having a reasonable excuse to be allowed by the said justice," but the whole case shows that even at that time a summons was held to be necessary before a warrant issued in execution; which, as my brother *Littledale* has pointed out, differs much in this respect from a warrant in the nature of mesne process. The remaining question is, whether the present defendants can justify under the warrant, it not having been directed to them, but to their clerk. The reasons for which such a warrant, though irregular, would be a protection to an officer is, that he would not be entitled to set up his private opinion against that of the justice as to the goodness of the warrant. He is bound to obey it, and is therefore protected in doing so. But the defendants were not so bound. If they did not act upon the warrant they were in no way answerable, and they cannot justify under it if they have officiously used it. The case is not like that of persons called in to assist those who have a warrant to execute. This is an action of trover against parties who first set the law in motion, who have received the fruits of the levy, and who plead that the goods were taken by their officer and under their direction. They have officiously interfered in the execution of the warrant; they must answer for this, and they cannot set up in their defence the warrant, which was not directed to them. In *Webb v. Batchelour* (a) the case was quite different, for the parties who justified under the warrant were those to whom the warrant was directed, and who were bound to obey it.

WILLIAMS, J.—There is no doubt that the issuing of this warrant was a judicial act. By section 72 of the Gas Company's Act no proceedings can be taken, whether summarily or by the ordinary process of law, for recovery of the rents in question, until the expiration of ten days after demand. A warrant then for the purpose of this levy could not be claimed as matter of course, and without inquiry to satisfy the justice that it was grantable, any more than a warrant to arrest for felony could be claimed without any good ground being made for such a proceeding. The act, therefore, being clearly judicial, the party against whom the application was made should have been summoned, and have had an opportunity of showing cause against the granting of the warrant. *Rex v. Benn* (b) was decided under a different statute, and the judgment of Lord *Kenyon*, which has been referred to, went somewhat beyond the immediate question in the case; but I never heard the proposition doubted that a party is not to suffer in person or in purse without an opportunity of being heard. As to the other point, the attempt of the defendants to justify under *Webb v. Batchelour*, that was the case of an officer executing process or a warrant. I think that that case bears no analogy to the present. The reason of that decision is plain enough. It would be wild work if the officer were entitled to scan the warrant delivered to him, for the purpose of ascertaining whether it was regular or not, under the particular circumstances of each individual case. But here the persons justifying are not officers acting under the warrant, but are parties who allege that money

(a) 1 Ventr. 273; Freem. 396, 407, 457, 488. (b) 6 Term Rep. 198.

was due to them, and that the warrant was executed under their authority for the purpose of satisfying their demand. There is therefore no analogy between this case and that of an officer, on which supposed analogy the argument of the defendants' counsel from first to last did absolutely depend.

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Lord DENMAN, C. J. added,—I should wish to mention *Harper v. Carr* (a), where Lord *Kenyon* said, “It is an essential rule in the administration of justice, that no man shall be punished without being heard in his defence; the party must be summoned before a warrant of distress is granted, as we decided in *Rex v. Benn*, and on that summons many circumstances may appear to show that a warrant of distress ought not to be granted.” It is clear therefore that he had a strong opinion on this point.

Judgment for plaintiff.

(a) 7 Term Reports, 275.

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**ACTION** on the case, for negligence as an attorney. Declaration stated, that the defendant was retained by the plaintiff as his attorney to sue one *David Edwards*, for the sum of 39s. 11d., but that defendant did not, nor would prosecute, conduct, or manage the said business and employment with due and proper care, skill, and diligence; but, on the contrary thereof, the defendant afterwards, to wit, on the 20th day of *August*, 1833, wrongfully and knowingly commenced and prosecuted a certain action for the recovery of the said sum of 39s. 11d., in the name of the plaintiff, against the said *David Edwards*, in a certain court which had no jurisdiction over the said debt or cause of action, to wit, the court of the manor of *Gower*, the said debt having arisen out of the jurisdiction of the said court of the manor of *Gower*, as defendant then well knew; and such proceedings were thereupon had in said court, that afterwards, to wit, on 3d day of *December*, 1833, in consequence of the negligent and improper conduct of defendant, the plaintiff was forced and obliged to have, and then had, judgment of nonsuit signed against him, and was then nonsuited in said court, whereby said action became and was rendered wholly abortive and of no effect. *Pleas*:—1st. The general issue. 2nd. That plaintiff was not, in consequence of the negligent and improper conduct of defendant, forced and obliged to have, nor did he have, judgment of nonsuit signed against him, nor was he nonsuited in said court.

The cause was tried before Mr. Justice *Williams* at the Spring Assizes, 1835, for the county of *Glamorgan*, when it appeared that the plaintiff was a victualler at *Swansea*, the defendant an attorney there. In or about the month of *April*, 1833, an action upon promises was brought in the baron court, for the manor of *Gower*, by the defendant *Gibbs*, as the attorney for and on behalf of the plaintiff, *John Williams*, against one *David Edwards*, to recover the sum of 17s. for goods &c. sold in *Swansea*, the promise to pay having been made within the jurisdiction of the court of *Gower*. On the 22d of *October* following, a declaration was filed in that court in the action of *Williams v. Edwards*, and subsequent to that date

Evidence of a promise to pay, made within the jurisdiction of a court baron, is not alone sufficient to maintain an action for goods sold and delivered there. Evidence of the consideration on which that promise was made must also be given.

If an attorney brings an action within a court of limited jurisdiction, knowing that the circumstances which gave the right of action arose out of the jurisdiction of such court, he is guilty of negligence.

An allegation in a declaration, that a plaintiff was nonsuited in such an action, is supported by proof that in a case standing first in the list, and depending on the same circumstances, the plaintiff was nonsuited, and that when the second case was called the judge intimated what he should do, and to save expense the jury was not sworn, but the

clerk of the court entered a judgment as in case of a nonsuit in his books.

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Mr. John Davies, the attorney for *Edwards*, agreed to put such cause at issue and to try the same on 3rd *December*, 1833, being the next Court-day after such agreement; and, accordingly, *Gibbs* gave notice of trial for that day. When the list of the jury was handed to the proper officer to call the cause on and swear the jury, it was ascertained that there was not any plea on the file, and it was objected, on the part of the plaintiff, that the trial could not proceed without a plea being delivered, but the defendant proved that the plea had been left by his clerk at the office of the steward of the court for him to file, and the steward swore the clerk to that fact, and then said, that enough had been done by the practice of that court to permit him to proceed with the cause. The plaintiff's attorney, the present defendant, however refused to try, as there was not any plea on the file. There was a case just before it in the list which had already been tried, and in which the plaintiffs had been nonsuited on account of the action having been brought in the manor court of *Gower*, when the cause of action arose in *Swansea*. As the same objection existed in the case in which *Williams* was plaintiff and *Edwards* defendant, the steward said that he should nonsuit in the same manner if that case was brought on, and he therefore recommended, that to save expense the jury should not be sworn. The attorney for *Edwards* then moved for judgment as in case of a nonsuit, which was objected to; and it was stated to him, that if he moved for any thing, it should be for costs for not proceeding to trial according to notice, which he accordingly did; but the entry of the motion was afterwards made as for "a judgment as in case of a nonsuit" for not proceeding to trial. At the trial of the present cause evidence of these facts having been given, many objections were taken to the right of the plaintiff to recover. Among the rest it was said, that this action being an action on the case for damages for want of skill, the plaintiff was bound to prove every part of the declaration, the retainer, the proceedings in the action in the manor court, that such manor court had no jurisdiction, and that plaintiff was forced and obliged to have, and did have, judgment of nonsuit legally signed against him in such action, and also that it was occasioned by the negligence of his attorney, the defendant in this action; it was contended, that the action in the manor court was never put at issue, by reason of the defendant *David Edwards* not having pleaded, and therefore the cause could not be tried for want of an issue; that no judgment as in case of a nonsuit could be signed by the defendant until after issue joined, (see 14 *Geo. 2*, cap. 17;) and that by the common law no judgment of nonsuit for not going to trial pursuant to notice could be moved for in any court whatever, except in the courts specially mentioned in that statute; the common law knowing nothing of any such judgment. The learned judge however did not adopt this view of the case, but left it to the jury to say, first, whether the defendant knew the facts on which he had brought the action in the court at *Gower*; and secondly, whether, though the plaintiff might have instructed the attorney to bring the action in that place, the attorney ought not to have warned him of the danger of a nonsuit from so doing. The jury found a verdict for the plaintiff. A rule had since been obtained to set aside that verdict and have a new trial.

*V. Williams and Powell* showed cause.—The defendant here is clearly liable to answer for negligence. The action was improperly brought in the manor

court of *Swansea*, and *Peacock v. Bell* (a) shows, that unless it appear on the record that the cause of the promise arose within the inferior jurisdiction, advantage may be taken of the omission on a writ of error. One objection here is, that there is a variance between the declaration and the proof, for that the declaration alleges that the plaintiff had judgment of nonsuit signed against him; whereas, from the evidence of Mr. *Thomas*, the steward, it appears that it was judgment as in case of a nonsuit. There is no such distinction between the two things as to form any variance. The definition of a nonsuit is given by Lord *Ellenborough*, in *Paxton v. Popham* (b), in these terms: "A nonsuit is a judgment against the plaintiff for not appearing on a day when he is demanded." The plaintiff here falls within that definition, for he did not appear when demanded in the court at *Swansea*. There is therefore no variance. Besides, this is an action of tort. In tort, the substance of the declaration must be proved, not the letter of it, as in contract. There are many cases which show that a statement such as this, is merely matter of inducement, and if so, it need not be exactly proved. *Purcell v. Macnamara* (c), *Phillips v. Shaw* (d), *Stoddart v. Pulmer* (e), and *Judge v. Morgan* (f). The declaration was sufficiently supported by the proof, and that proof showed a case of gross negligence on the part of this defendant. There had been an objection made in the court baron, on the ground that no plea had been properly filed, but the steward held that that objection was untenable, and directed the case to proceed; and it was then found that the cause of action arose out of the jurisdiction, and therefore the action could not be sustained; the plaintiff was consequently nonsuited. That nonsuit arose from the negligence of this defendant, who was, as the jury found, aware, before he brought the action, of the circumstance on which the nonsuit afterwards proceeded.

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*J. Evans* and *Nichol*, in support of the rule.—The judgment in the court baron is altogether incapable of being supported. The steward suffered the case to proceed to trial on a plea, the contents of which he did not know. The declaration in the present case does not sufficiently set forth a cause of action. It states a train of facts, with a view to show that a judgment of nonsuit was recorded in the former action; the plea traverses those facts, denying that the plaintiff, in consequence of the negligent conduct of the defendant, had judgment signed against him. The plaintiff was not and could not be nonsuited in the court baron of *Gower*. Judgment of nonsuit, and judgment as in case of a nonsuit, are different things; and there are cases which show that a variance by the statement of one for the other is material. In *Edwards v. Lucas* (g) a variance of a similar sort, in an action against a sheriff, was held fatal. In this case no issue was joined in the baron court, and no jury was sworn. Now, till issue is joined, and till a jury is sworn, there cannot be a nonsuit; *Heath v. Walker* (h). There no issue was made up, and when the jury was about to be sworn, the Chief Justice dismissed the jurymen, and said, that as no issue was made up he could neither call the plaintiff nor suffer the defendant to take a verdict. The other side cannot deny that there was enough on the face of the record in this case to show

(a) 1 Wms. Saund. 73.  
 (b) 10 East, 366.  
 (c) 9 East, 157.  
 (d) 4 Barn. & Ald. 435.

(e) 3 Barn. & Cress. 2.  
 (f) 13 East, 547.  
 (g) 5 Barn. & Cress. 339.  
 (h) 2 Str. 1117.



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that the promise was within the jurisdiction. It is not necessary, in order to show that, for the plaintiff to prove that the items of the account accrued within the jurisdiction. It is sufficient if the account stated was so. *Emery v. Bartlett* (a), *Whitehead v. Brown* (b). The answer to this action is sufficient on the plea of not guilty. That plea must, under the new rules, put the wrong and the cause of it at issue; *Thomas v. Morgan* (c). There a plea of not guilty was held to put the scienter as to the mischievousness of animals in issue. The plaintiff therefore has not shown enough to establish his right to maintain this action. The defendant sued in a Court which appeared to have full jurisdiction. The whole of the proceedings in the court baron ought to have been shown in this case (d), and then it would have appeared that the fault was that of the steward alone, and that his judgment could not be maintained. It ought to have been proved that *Swansea* was beyond the jurisdiction of the court baron of *Gower*; *Fisher v. Lane* (e). For this Court cannot take judicial notice of the limits of the jurisdiction of an inferior court; *Moravia v. Sloper* (f). Gross negligence cannot be imputed in this case. *Doorman v. Jenkins* (g) shows what gross negligence is. A mistake in point of practice as to the effect of the delivery of an account stated, is not gross negligence. In a case of this sort, reasonableness belongs to a knowledge of the law, and is to be decided by the justices (h). The jury ought to have been told that no substantive negligence was proved against this defendant. The promise was proved to be within the jurisdiction, and that is sufficient in these courts in *Wales*.

Lord DENMAN, C. J.—This rule has been obtained—first, because it is said that the jury ought to have been told that no substantive negligence was proved against the attorney, for that he sued in a court in which, for aught that appeared, he might properly sue and recover the debt; and that the ill success of the suit was the mistake of the steward; and secondly, that there is no particular mode of injury stated on the declaration, as the plaintiff was not and could not be nonsuited. It appears to me that there was evidence of misconduct on the part of the attorney himself, for bringing an action in a court which had not jurisdiction over the subject-matter. Although the cases in *Strange* and in Lord *Raymond* say, that to maintain the action within the particular jurisdiction, the settlement of account is enough, without proof of the particular items, for that the account stated is the consideration for the promise, and there needs nothing else to maintain the action, still, it seems to me that the promise to pay is only an inference, a result of law amounting to an acknowledgment that there was an existing debt, but not amounting to a statement that it was within the jurisdiction. With respect to whether there was any issue joined, that is a matter of evidence, not of law, and there was evidence here to show, that, according to the practice of the court baron of *Gower*, there was an issue joined on the pleadings. It is true that the jury was not sworn, after the opinion of the steward had been expressed. That however was only with a view to save expense. The swearing of the jury had nothing to do with the attorney who brought an action in a court in which it could not lie. The evidence was sufficient to

(a) 2 Lord Raym. 1555; 2 Str. 827.

(b) 1 Lev. 96.

(c) 1 Gale, 172; 4 Dowl. P. C. 223.

(d) Phill. on Evid. 390.

(e) 2 Sir W. Bl. 834.

(f) Willes, 30.

(g) 2 Ad. &amp; El. 256.

(h) Co. Litt. 56 b.

show that the cause of action was in itself a right one, if that action had been properly brought. The argument whether it was a nonsuit, or a judgment in case of a nonsuit, is not to be considered. I think, in fact, that there was a nonsuit, as the party admitted the fact, on which, if the jury had been sworn, and the case fully discussed, there must at last have been a nonsuit.

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LITLEDALE, J.—Where two parties meet together and settle their accounts, so that there is a distinct claim on the one hand and a distinct settlement on the other, it is not necessary to show that some or all of the items of an account so settled arose within the jurisdiction of the inferior court. But it is sufficient to show that the account was settled, and the promise to pay upon such settled account made within the jurisdiction. The settlement of the account within the jurisdiction would be sufficient as a cause of action, and the proceedings in the court baron would be right. The doubt I have is, whether here the promise to pay can be considered as evidence of an account so stated. A mere promise would not be sufficient for any purpose, there must be something which takes place from which it might be inferred that this promise referred to some other thing. Where the place in which the two parties met, and what passed between them, are known, and where their conversation is followed up by a promise to pay, the action might be well brought within the inferior jurisdiction within which such promise was made; but a mere promise to pay would not enable the party to sue, though proved to have been made within the jurisdiction. If the present defendant did not prove his client's case by other evidence than that, it would be for the jury to say whether he was not guilty of such negligence as would in fact enable the client to sustain this action. With respect to the rest of the case as to the delivery of the plea, it does not appear to me to be material in this case. There had been a nonsuit in a previous case, for the very same objection which existed in this; and the party here was substantially compelled to submit to a nonsuit, and the form of the trial was spared only with a view to save expense. If the jury here thought that in fact there had been negligence, I think that their finding can be well supported.

PATTESON, J.—There are two issues in this case: first, whether the defendant, by pleading the general issue, can be taken to deny the negligence, as alleged in the declaration; and secondly, whether there was a judgment of nonsuit. With respect to the first, that raises this question, whether or not the action in the court baron of *Gower* could properly be maintained there. It is said, that it might, for that the form of *concessit solvere* is general in *Wales*, and that it need not appear that the matters on which the promise was made were within the jurisdiction. It may be so in some *Welsh* jurisdiction, as for instance, it is sufficient in the Court of Great Sessions there. That appears by the note to the case in 1 *Wms. Saunders* (a). But it must appear that such promise was founded on some consideration. There must therefore be evidence to show consideration, and that must be within the jurisdiction. The case in Lord *Raymond* (b) shows that the account stated was the consideration there, and that was sufficient there without showing that all the items of that account arose within the jurisdiction. I do not understand that this was admitted in the present case, though the promise itself was

(a) *Peacock v. Bell*, 1 *Wms Saund.* 73.

(b) *Emery v. Bartlett*, 2 *Lord Raym.* 1555.

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admitted. Suppose a witness was to say, I saw the plaintiff and defendant, and the defendant promised to pay 20*l*. The defendant must admit that he owed the money before he promised to pay it; for the mere promise, without more, would be a *nudum pactum*, and no action could be maintained on it in a court of law. Then the question is, whether there was a nonsuit. There were two actions by different persons against the same defendant, and these actions came on together, and it was then objected that there was not a plea in either of them. There was then a discussion whether there was a plea or not. It was not distinctly proved where this plea was, or what its contents were. Then a witness was called and said, that there was a plea delivered in each action, though the officer of the court had omitted to file it. Then the steward, who was the judge of the court, said that he was satisfied that there was a plea, so as to enable him to proceed with the trial. That ruling applied to both cases, for they discussed both at the same time. They did not show what the plea in *Jones v. Edwards* was, but they had evidence which showed that the cause of action arose out of the jurisdiction, and the plaintiff there was nonsuited. Then this case was called on, and it was said that it was for the same cause of action arising out of the same circumstances. Then there was a consultation with the advocate, who said, that there was no use in going on after the first case had been disposed of. It is now sworn that the present defendant thereupon agreed to be nonsuited; but the facts speak for themselves in that respect. The steward said that it was unnecessary to swear the jury, as that would be an additional expense, and judgment as in case of a nonsuit was given. That judgment, it is said, was not known there; and it is contended, that the court had no right to give it, but the court could give a judgment of nonsuit. The entry might have been altered afterwards, but that is of no moment, for the other facts explain all. I think the verdict right, and that it should not be disturbed.

WILLIAMS, J.—I fully agree with the rest of the Court. In the first case, after deciding the question of plea pleaded, the jury was sworn upon the evidence, and therefore there was a nonsuit in form and substance. If the jury had been sworn in the second case, the same thing would have taken place, for the same objection would have arisen, and must have been disposed of in the same manner. Then there would have been another nonsuit in form and substance; but instead of that, the attorney for the defendant in the second action asked whether it would not be a waste of the time of the court to proceed further, and with a view of saving time and expense another course was adopted. Whatever was the form of that proceeding it was in substance a nonsuit. The officer of the court said that the plea was sufficient, and there was therefore evidence of an issue joined. Then as to the evidence, there was nothing more than a mere promise to pay proved, and that was not sufficient to maintain the action in the court at *Swansea*.

Rule discharged.

King's Bench.

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REX v. The COMMISSIONERS OF CUSTOMS.

**J.** *JERVIS* had obtained a rule for a *mandamus*, calling on the defendants to deliver up to a Mr. *William George Blake* a quantity of tobacco, alleged to belong to him, and to have been improperly detained by them. The affidavits on which the rule was obtained, stated, that the tobacco, on its importation into *London*, had been placed in one of the bonding warehouses. It was afterwards determined to send it to *Londonderry*, and the importer executed the usual bond for the payment of the duty on the arrival of the tobacco at that place. It was put on board a vessel called the *Surah*, which was wrecked at *Torbay*; but a large part of the tobacco, about nineteen hogsheads, had been saved, and the custom-house officers took possession of it and lodged it in the king's warehouse there. The owner paid into the treasury as much money as he deemed would cover the amount of duty (5*l.* per cent. *ad valorem*) on tobacco which had been wrecked, and then applied to the commissioners of the customs to have the tobacco delivered to him, as he contended, that under the 3 & 4 *Will.* 4, c. 52, s. 50, the tobacco thus saved from wreck, was subject only to the duty on unenumerated goods. The custom-house officers, in obedience to the orders of the commissioners of customs, refused to give up the tobacco, except upon the payment of the ordinary duty on imported tobacco.

Where imported goods were taken possession of by custom-house officers, and the owner claimed them upon payment of a small *ad valorem* duty, as goods wrecked, but the officers, though that duty had been paid into the treasury, refused to deliver them up, except on payment of the full importation duty: *Held*, that this Court would not grant a *mandamus* to compel the commissioners of customs to deliver up the goods, but left the party to pursue a civil remedy if the goods were wrongfully detained.

The *Attorney-General* showed cause against the rule.—The owner here, even if entitled to have the tobacco, has not adopted the proper means to assert his right. He may bring trover for the tobacco—and it is not clear that he could not maintain replevin. In *Selwyn's Nisi Prius* (a), it is stated generally, that replevin may be brought in any case where a man has had his goods unlawfully taken from him. But it is clear here, that Mr. *Blake* is not entitled to have this tobacco on the payment of less than the ordinary duty. That question depends on the construction of the 50th section of the 3 & 4 *Will.* 4, c. 52 (b). This tobacco was not “wreck” within the meaning of that term as used in the statute. The whole context of the 50th section shows, that wreck in the statute means *wreckum maris*, where no owner appears to claim the goods, and where the goods are very considerably damaged. If they are saved, as they were here, from the sea, and if an owner appears, then they do not fall within the provisions of the statute. Goods saved under such circumstances, are subject to duty, for the provision at the end of the section speaks only of such goods as cannot be sold for the amount of

(a) Page 1172.

(b) By which it is enacted, “ That all foreign goods *derelict, jestam, flotsam* and *wreck*, brought or coming into the United Kingdom, or into the *Isle of Man*, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to. Provided always, that if, for ascertaining the proper amount of duty so payable, any question shall arise as to the origin of any such goods, the same shall be deemed to be of the growth, produce, or manufacture of such country or place as the commissioners of his Majesty's customs shall

upon investigation by them determine. Provided also, that if any such goods be of such sorts as are entitled to allowance for damage, such allowance shall be made under such regulations and conditions as the said commissioners shall from time to time direct. Provided that all such goods as cannot be sold for the amount of duty due thereon, shall be delivered over to the lord of the manor or other person entitled to receive the same, and shall be deemed to be unenumerated goods, and shall be liable to and shall be charged with duty accordingly.”

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duty due thereon, so that if they are not damaged to that extent, they do not fall within the provision, and cannot be treated as unenumerated goods. He was stopped.

*J. Jervis*, in support of the rule.—Trover cannot be maintained, for the tobacco is in the hands of the king.—[*Littledale*, J.—Then this would be a *mandamus* to the king, which cannot be issued.]—Goods may be in the king's hands for one purpose and not for another. They are so here sufficiently to prevent the plaintiff from bringing trover.—[*Lord Denman*, C. J.—The tobacco is under the control of the king's officers. This Court is not to be told that the king's officers are not subject to an action. Such an action may be maintained for unlawfully taking the goods, or, if you have paid the duty, for detaining them.]—Such an action could not be maintained against the comptroller, for he was bound to take the goods to the king's warehouse. Against whom then could it lie? Certainly not against the commissioners of customs, for doing what they are bound to do in order to secure the receipt of the duty. The officers here are only guilty of a mere *nonfeasance*, and that is not sufficient to maintain trover. Neither could an action be brought as for a breach of duty in not delivering up, for it is not the duty of any particular officer to deliver the goods. There is therefore no person against whom the applicant could proceed. The party here has a legal right, but has no legal remedy. In such a case this Court will exercise its prerogative powers to put him in possession of his right.—[The *Attorney-General* suggested, that *Whitelegge v. Richards* (a) showed, that where an officer refused to do that which in the discharge of a public duty he was bound to do, he was answerable to a private individual who was injured thereby.]—That case does not at all apply to the present. The defendant there was an officer of the Insolvent Debtors' Court, and the case was not argued nor decided on the point for which it is now cited.

*LORD DENMAN*, C. J.—This rule must be discharged. If the commissioners are justified in what they have done, we cannot interfere by *mandamus*. If they are not, if they have acted without authority, the party now applying has his remedy by action.

*LITTLEDALE*, J.—This is in effect an application for a *mandamus* to the crown. There is no precedent for such an application. Some time ago there was a *mandamus* granted to certain officers of the treasury to pay over certain monies which they held in their hands; but then they did not claim any title to retain those monies which they admitted they had received on behalf of the applicant. That case, therefore, is not in point for the purposes of this application.

*PATTESON*, J.—The applicant here states in his affidavit, that he has paid over to the treasury all the money that the customs are entitled to receive. The next step he has to take, is to require the documents which will put him into possession of the tobacco. If those are refused, he must proceed by action. We cannot assist him in the way now prayed.

*WILLIAMS*, J. concurred.

Rule discharged.

(a) 3 Brod. & Bing. 188; 2 Barn. & Cres. 45, S. C. in error.

## SHEARWOOD v. HAY.

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**I**NDEBITATUS ASSUMPSIT for medicines, attendance, and journeys, supplied and performed by the plaintiff as a surgeon and apothecary. Plea—General issue. The cause was tried before the under-sheriff of *Lincolnshire*, when the plaintiff was called on to prove himself to be an apothecary within the terms of the 55 Geo. 3, c. 194, s. 21 (b). The plaintiff was not prepared with this proof, and was therefore nonsuited. A rule had been obtained, calling on the defendant to show cause why the nonsuit should not be set aside and a new trial granted, on the ground that, since the new rules, the defendant, if he meant to rely on the incapacity of the plaintiff to maintain the action, was bound specially to plead it, and could not go into that defence under the general issue.

In an action to recover the amount of an apothecary's bill, the proof required by the statute 55 G. 3, c. 194, s. 21, that the plaintiff is an apothecary, is a condition precedent to his right to recover. He must therefore give that proof, although the defendant has not put on the record any special plea founded on that statute (a).

*Whitehurst* showed cause.—The defendant had a right to prove this defence under the general issue: *Morgan v. Ruddock* (c). The new rules cannot affect this question: the judges' orders cannot repeal the positive provisions of a statute. The object of the Apothecary's Act was similar to that of the Stamp Acts. It was to compel parties to comply with the provisions of a statute, and to protect the revenue—and this object cannot be indirectly defeated by the framing of new rules of pleading. But it is denied that the new rules apply to a case like the present. *Edmund v. Harris* (d) has been overruled in a case of *Groundsell v. Lamb*, tried before Lord Abinger at *Lincoln*. His lordship said that the decision in that case had been much considered and questioned among the judges. In *Gardner v. Alexander* (e), it was held by the Court of Common Pleas, that under the general issue to a declaration in the common form for goods bargained and sold, evidence of a special contract might be given; and in a case of *Bloomfield v. Smith*, recently moved in the Exchequer, the Court said that the general rule on this subject must be considered as laid down in *Cousins v. Paddon* (f), where it was held, that under a plea of *nunquam indebitatus*, the defendant might show that the work was done under a specific contract, and that that contract was not performed. In *Waddilove v. Barnett* (g), it was held, that in *assumpsit* for use and occupation, the defendant might, under a plea of *non assumpsit*, show that he had received notice to pay rent to a mortgagee.

*Humfrey*, in support of the rule.—The authority of the new rules which are made under the provisions of a statute, is sufficient to act as a repeal of the provisions of a former statute. A case has occurred this term in the Exchequer, where the judges have effectually repealed the authority of a statute of set-off. The Court of Exchequer has decided, that where the general issue is pleaded, and it is intended to prove a set-off, such set-off must be pleaded, and proof of it cannot be given under the general issue.—[Mr.

(a) See the note to the next case, p. 250.

(b) By which it is enacted, that "no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the 5th day of August, 1815, or that he has obtained a certificate to practise as an

apothecary from the master, wardens, and society of apothecaries."

(c) 1 Harr. & Wol. 505.

(d) 2 Ad. & Ell. 414.

(e) 3 Dowl. P. C. 146.

(f) 1 Gale, 305.

(g) 11dges, 395; 2 Bing. N. C. 528.

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*Whitehurst* explained the decision of the Court in the case referred to, as being this—the Court said, that the statute limited the right of giving a set-off in evidence, by requiring a notice which had not been necessary under the common law.]—The statement in the declaration here is positive that the plaintiff is an apothecary. If it was meant to contradict that statement and put the plaintiff to prove that fact, the denial of it should have been specially pleaded. The rule that a plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, is strictly applicable to the present case; for here the defence attempted to be set up is not a denial in fact of the contract or of the promise, but the assertion of something personal to the plaintiff, which incapacitates him from enforcing the contract. This is like the case of an attorney's bill, where the non-delivery of the bill being a statuteable defence, ought to be pleaded. It is an avoidance of the contract, and therefore falls expressly within the terms of the new rules.

The Court postponed giving judgment in this case until the case of *Willis v. Langridge* had been argued.

## WILLIS v. LANGRIDGE.

Nor does it make any difference in this respect that the defendant has pleaded a tender as to part of the plaintiff's demand, though such plea is expressly pleaded to a count of the declaration where the work is said to have been done, and the medicines furnished by the plaintiff as an apothecary. A plea of tender merely admits the defendant's liability on the contract to the amount tendered.

**D**EBT to recover 5*l.* for work and labour as a surgeon and apothecary, with a count for money had and received, and an account stated. Pleas—As to the several counts in the declaration, except as to 5*s.* 9*d.*, parcel of the money in the first count of the said declaration mentioned, *nunquam debuit*; secondly, a set-off; and thirdly, as to the 5*s.* 9*d.* a tender. The bill of particulars was for 2*l.* 2*s.* on the first count, and 1*l.* 8*s.* 4*d.*, on the others claimed as a balance due on the sale of a house. This cause was tried before the sheriff of *Middlesex*, when a verdict was found for the plaintiff for the sum of 3*l.* 7*d.*, subject to a motion to reduce it to the sum of 18*s.* 7*d.*, if the Court should be of opinion, that on the pleadings, as they now stood, the plaintiff was bound in the first instance to prove that he was an apothecary. A rule having been obtained, pursuant to the leave reserved,

*Humfrey* showed cause.—Whatever doubt may be entertained in the last case, there can be none in this, for here the plea of tender admits, that so far as the sum of 5*s.* 9*d.* is concerned, the plaintiff is an apothecary. It is a plea to the first count of the declaration generally, and in that count the plaintiff is described as an apothecary. If he is so to that extent, he is so to the extent of the whole bill. The words of the statute are therefore admitted to be satisfied in this case.

*Waddington*, in support of the rule.—The plea of tender joined, with the general issue, admits nothing but that the sum tendered is due; *Simpson v. Routh* (a). The principle of that case is exactly applicable to the present. There a distress had been levied upon the plaintiff, and her goods had been sold to satisfy a demand for poor rates. There remained in the hands of the defendants a surplus of 4*l.* 7*s.*, the defendants had tendered 3*l.* 14*s.* to the

(a) 2 Barn. & Cres. 682.

plaintiff, who refused to accept it. He afterwards brought money had and received, and the defendants pleaded a tender of 3*l.* 14*s.*, and paid that sum into Court. It was objected, that under the 27 *Geo.* 2, the plaintiff could not recover without first proving a demand before action brought, and the Court held that that objection was well founded, and that the tender did not make such demand unnecessary. In *Scaton v. Benedict* (a), where the question was as to the authority given by a husband to his wife to contract debts, it was held, that payment of a certain sum of money into Court, did not admit more than the sum so paid in, and could apply only to legal demands. In like manner payment of a certain sum, though paid in generally, does not take a case out of the statute of limitations; *Long v. Greville* (b). The plaintiff here might have been an apothecary when the 5*s.* 9*d.* became due, and not when the rest of the debt was incurred. The plea of tender does not go further than this, that it prevents the party pleading it from afterwards setting up any thing that is inconsistent with it.—[*Patteson, J.*—There is a case in *Campbell's Reports* (c), where payment of money into Court was held to obviate such an objection.]—That case must be taken to be overruled by *Simpson v. Routh*. The being an apothecary is a condition precedent to the right to maintain this action, and the plaintiff was therefore bound to prove that he bore that character. The defendant cannot know whether the plaintiff is entitled to practise as an apothecary, and that distinguishes the present case from the case of an attorney's bill, where it is in the defendant's own knowledge whether a bill has been delivered or not, and where, if he means to rely on the non-delivery, he should give the plaintiff notice of that defence.

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Lord DENMAN, C. J.—The application in the first of these cases was to set aside a nonsuit, which proceeded upon the ground of the plaintiff's having failed to prove that he was an apothecary within the terms of the 55 *Geo.* 3, c. 194. The plaintiff having proved the delivery of the medicines, was called upon by the under-sheriff to prove that he was an apothecary before he could be allowed to recover the amount, the under-sheriff thinking that this was part of his title to recover, which the statute made it imperative on him to make out. I own that it appears to me that the under-sheriff was right in the view which he took of the case. It is a case where a party is called upon, by the provisions of a statute of public policy, to prove that, at the time when the transaction took place, he filled a particular character. It was a condition precedent on the part of the plaintiff to prove himself to have been an apothecary, before he could place himself in a situation to recover. The defendant could not have the means of knowing whether the plaintiff filled that character or not; and if he had pleaded that the plaintiff was not an apothecary, and had failed in his proof, he would have had to pay the costs of that issue. That seems to me to make a clear distinction between the case of an apothecary and of an attorney suing on his bill. In the latter case the defendant must know whether a bill from the attorney had ever been delivered to him, and it may be very reasonable that he should be obliged to give the plaintiff notice that the ground of his defence was the non-delivery of a bill one month before action brought. The provisions of the

(a) 2 Moore &amp; P. 66; and 5 Bing. 28.

(b) 3 Barn. &amp; Cres. 10.

(c) *Lipscombe v. Holmes*, 2 Camp. 441.



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2nd Geo. 2, are extremely different from an act of parliament, making it necessary that the plaintiff, as a condition precedent to entitle himself to recover, shall show that he filled a particular character. In the second of these cases the same question arises, with this difference, however, that there is one count in which the plaintiff says that the defendant was indebted to him for goods sold, and work and labour as an apothecary, and to this count the defendant had pleaded a tender of 5s. 9d.; and it is said that having dealt with the plaintiff as an apothecary, and pleaded a tender to him in that character, it is an admission upon the record that he was an apothecary. I do not however think that this plea makes the difference which is supposed. It is too much to say, that a person who deals with another in the character of an apothecary, is by that circumstance prevented from requiring him to show that he really holds that character. The new rules do not apply to cases of this sort. The clause on which I am proceeding, does not say that the contract shall be void; but that the party shall not recover upon it unless he shows that he comes within the provisions of the statute. The plaintiff in each of these cases has failed to show that he fills that character in which alone the law permits him to recover. In the first of these cases, therefore, the rule for setting aside the nonsuit will be discharged, and in the other the rule for reducing the damages will be made absolute.

LITTLEDALE, J.—I am entirely of the same opinion. The new rules do not apply to a case of this kind. It is true that they say, that when a man wishes to avoid a contract by matter of law, he must plead it; but here the contract itself must first be set up. There is a case of *Hodgson v. Taylor* [Qu. *Hodgson v. Armstrong*] now depending in this Court, and involving a principle very much like the present. The contract here is not prohibited by the statute, but the statute requires that the plaintiff should show that he filled a particular character before he is allowed to recover on the contract. There is no doubt that a defendant would have to plead any special matter which avoids the contract in point of law. Here the provision of the act contains nothing to avoid the contract as between the parties. There is nothing in the contract itself against the general policy of the law. It affects the character of the plaintiff himself, and prevents him from recovering unless he can prove that he filled that character at the time when he assumed to act as an apothecary. It is impossible for the defendant to know whether the plaintiff filled that character or not, and he is therefore precluded from setting up the defence that the plaintiff was not an apothecary. Where an act of parliament has positively prohibited any thing from being done, the new rules cannot abrogate the provisions of the act: but that is not the case here. The nonsuit therefore in *Shearwood v. Hay* was right. With regard to the other case of *Willis v. Langridge*, the plea of tender does not at all admit that the character of the plaintiff was such as the statute requires him to prove it to be before he can recover.

PATTESON, J.—These cases seem to have been brought before the Court for the purpose of reviewing my decision in *Morgan v. Ruddock*. I came to that decision after great consideration, and I own that no reasons have been urged to induce me to retract any thing which I there expressed. From the words of this particular statute, I think that the plaintiff is bound to prove

that he is an apothecary, entitled under the words of the statute to maintain this action. What are those words? that "unless such apothecary shall prove, &c." I cannot get rid of these words, which throw the affirmation of proof on him as a condition precedent to his recovery. With respect to the point arising in the second case on the plea of tender, I do not think that it admits a contract beyond the amount of the sum tendered: *Reid v. Dickons* (a), is an authority in point. In that case Lord *Denman* said, "the payment of money into Court merely admits the defendant's liability on the contract to the amount paid in." And Mr. Justice *Parke* added, "but beyond that sum every defence is open to him." So here every other defence was open with respect to every other sum, except that which is admitted on the record to be due.

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WILLIAMS, J.—I think that the under-sheriff, in the first case, was right. Where I find a statute expressly requiring something to be done, and the words of that statute are, as they are here, clear beyond all doubt, I shall require something extremely cogent to satisfy me that the new rules dispense with the proof of the thing thus required. As to the last case, I do not think that the plea of tender gets rid of the necessity of proving that which the statute has so clearly required to be proved.

Rule for a nonsuit in *Shearwood v. Hay*, discharged.

Rule for reducing the damages in *Willis v. Langridge*, absolute.

(a) 5 Barn. & Ad. 499.

### REX v. ST. JAMES, WESTMINSTER.

THIS was a rule for a *mandamus* to be issued to the inhabitants of *St. James, Westminster*, commanding them to assemble and proceed to the election of churchwardens. The object of the application was to take the opinion of the Court on the question, whether this parish was to adopt the new mode of electing parish officers now practised in *St. Martin's*, or was to continue the mode in which it had hitherto been accustomed to make the election. The affidavits stated, that by the 1 *James 2*, c. 22 (b), the parish of *St. James* was carved out of the parish of *St. Martin's*, and by that act it was directed that the vestry of *St. James* should be appointed in the manner in which the vestry of *St. Martin's* was appointed. Within these few years there had been a complete change in the mode of appointing the vestry of *St. Martin's*, which was now elected by the inhabitants at large; and the question was, whether, as of course, that change was to be adopted in *St. James's* parish.

Where an act of parliament created one parish out of a portion of another, and directed that the election of officers in the new parish should follow the mode adopted in the old parish:—*Held*, that this direction only applied to the mode of election then in practice in the old parish, and that if that mode was long afterwards declared to be illegal, and another substituted for it, the new parish was not bound to adopt the substituted mode.

It seems, that in a case where a parish is concerned, if a rule is obtained while certain persons are in office, but is not discussed till their time of office has passed, and other persons have been elected and sworn in, this Court will make the new officers parties to the rule, to enable them to show cause against it.

The *Attorney-General*, on an early day in the term, applied that the present churchwardens might be admitted to show cause against the rule. Since the rule had been granted, the new churchwardens had been sworn in, and their only wish was to take the opinion of the Court on the construction of the statute.

(b) Private Act.

certain persons are in office, but is not discussed till their time of office has passed, and other persons have been elected and sworn in, this Court will make the new officers parties to the rule, to enable them to show cause against it.

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Sir *W. W. Follett*, on the part of the inhabitants, did not oppose the application, and

The Court granted it.

The *Attorney-General*, and *John Jervis*, afterwards showed cause against the rule. The words of the statute of *James* are clearly opposed to the granting of this *mandamus*. That statute speaks of the election of the vestry as to be made according to the practice "now" in force in *St. Martin's*. No change in the mode of electing the vestry was then contemplated in that parish, but, at all events, it never was intended that the parish of *St. James* should follow all the alterations which in the course of time might be made in the government of *St. Martin's*. It was intended only that the parish of *St. James* should adopt the practice then in force in *St. Martin's*. The custom in *St. Martin's* was merely referred to for convenience, as enabling the legislature to declare in one sentence what the whole mode of proceeding in parish elections in *St. James's* ought to be.

Sir *W. W. Follett*, in support of the rule.—The right of electing the vestry is, at common law, in the inhabitants at large. The statute of *James*, by referring to the then practice in *St. Martin's* parish, took away that right; but when the practice in *St. Martin's* was altered by another statute, that right was restored. The mode of election in *St. Martin's* was adopted for *St. James's*, free from what was illegal in the parish of *St. Martin's*. It is now proved by the result of proceedings in this Court, that the practice then existing in that parish was an illegal practice, for a number of persons had assumed in that parish an authority which by law they could not rightly exercise. The example of *St. Martin's* was therefore wrongly copied at the time by *St. James's*, and now that that wrong example has been corrected by this Court, *St. James's* ought to adopt the legal practice which has been re-established in *St. Martin's*.

*Cur. adv. vult.*

Lord DENMAN, C. J.—We have looked into the act of the 1 *James 2*, c. 22, passed for the purpose of creating this parish out of a portion of what had been *St. Martin's* parish. That act directs, that there shall be an election of churchwardens, according to the previous course of practice in that parish. The phrase used, which is "according to the laws and statutes now in force," is not entirely without doubt, but we think that the description must be taken to apply to the course then in practice. If any change of the practice in one parish, according to that prevailing in the other, had been intended, some reference must have been made to the mode in which the law intended that change to operate in this parish upon a change taking place in the parish of *St. Martin's*. Such might have been superfluous if the alteration had been effected by act of parliament. If a new state of things was intended to follow in *St. James's* whenever it took place in *St. Martin's*, if it had been meant that the one was always to imitate the other, the legislature could easily have stated such to be its meaning. But no such thing has been done here, and there can be no doubt that no such change as that

which has now taken place in *St. Martin's* ever entered into the minds of the legislators in the time of *James the Second*.

Rule discharged.

REX v. JOHN MARSH.

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THE defendant was the occupier of three pieces of land, in respect of which a poor-rate had been made upon him, signed by the churchwardens and overseers of the poor of the tithing of *Alkington*, in the parish of *Berkeley*. He appealed against the rate, but the sessions confirmed it, subject to the opinion of the Court on the following Case:—

The whole question was, whether the three pieces of land are in the tithing of *Alkington* or in the parish of *Leonard Stanley*. Up to the 17th November, 1832, they had been rated to *Alkington*.

An act of 11 Geo. 4, c. 7 (a), passed for the inclosure of (*inter alia*) lands in the parish of *Leonard Stanley*, and it recited the General Inclosure Act (b).

On the 17th November, 1832, the commissioners appointed under 11 Geo. 4, c. 7, made the following determination with reference to the boundaries of the parish of *Leonard Stanley* and *Berkeley*, which adjoined each other.

"Whereas by an act passed, &c., (11 Geo. 4, c. 7.) I, the undersigned *Daniel Trender*, was appointed commissioner for carrying the same act into execution: and whereas disputes or doubts having arisen whether certain old inclosures, called respectively the "*Ham*," the "*Langett*," and "*Motford*," all of which are part of the estate of the Rev. *Thomas Heberden*, and are in the occupation of *John Marsh*, as his tenant, are parcel of the parish of *Stanley*, *St. Leonard's*, otherwise *St. Leonard, Stanley*, or of the parish of *Berkeley*, I, the said *D. T.*, in pursuance of the powers, and in compliance with the provisions contained in the said act and the therein recited act, have ascertained the boundaries of the said parishes respectively where they adjoin each other, and do hereby set out and determine and fix that the said inclosures respectively are parcel of the parish of *Stanley, St. Leonard's*, otherwise *St. Leonard, Stanley*."

The sessions thought, that under the provisions of 41 Geo. 3, c. 109, s. 3, it was necessary to have proof that the means of appeal had been afforded by a due service of the descriptions of boundaries, as therein provided, but that if this had been done, no appeal having ever taken place, they could not now inquire by what means and through what steps the commissioner had arrived at his decision, and they interrupted evidence which had been commenced as to that point, particularly as to his having examined witnesses without oath, and as to the existence of disputes before his perambulation commenced concerning the boundaries in question. With regard to the proper services of the description of boundaries, a question arises upon these circumstances. *Berkeley* parish is divided into four tithings, viz. *Berkeley town, Alkington, Ham*, and a fourth composed of *Hinton, Ham-fallow*, and *Ereadstowe*. There is but one church, which is in *Berkeley town*, and one chapel of ease, which is in *Ham*. Each of the tithings has a separate

The General Inclosure Act directs that a commissioner appointed under any private inclosure act shall, when about to set out "the boundaries of any parishes, manors, hamlets, or districts," give notices under his hand and seal, to be affixed to the doors of the churches of such parishes, and within one month after setting out the boundaries shall cause a description thereof to be left "at the place of abode of one of the churchwardens or overseers of the poor of the respective parishes," not adding "manors, hamlets, or districts." A commissioner appointed under a local act gave the proper notices of his intention to the churchwardens of four several districts forming one parish. These churchwardens were elected separately by the different districts, but each was sworn to act for the parish. The commissioner then ascertained the boundaries, and gave a description thereof and a copy of his determination to a churchwarden of that district in which the parish church was situated:—*Held*, that he had sufficiently complied with the provisions of the

(a) Private Act.

(b) 41 G. 3, c. 109.

statute; for though each district elected its own churchwarden, yet each churchwarden must be taken to be an officer for the whole parish.

The words of the statute having raised the difficulty, and the commissioner having acted with good faith, the Court declared that it should require very strong and convincing proof before it declared his act invalid.

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poor-rate, and each manages its poor separately, and paupers are removed from one tithing to another. *Berkeley*, *Alkington*, and *Ilan* have each one churchwarden and two overseers; *Hinton* and *Hamfallow* have an overseer each, and *Breadstowe* two, and there is one churchwarden for the three. The churchwardens for all are appointed at *Berkeley*; the following is the form of the appointment :—

“ At a vestry meeting, held in the vestry-room of the parish church of *Berkeley*, this       day of       , the following persons were nominated as proper persons to serve the offices of churchwardens for the town and tithings for the year ensuing, viz. :—

“ *A., B., C., D., E., F., G., H.*

“ In the presence of us.” (Here follow the signatures of the parishioners assembled in vestry.)

The outgoing churchwarden generally nominates his successor for the same tithing, but in case of a dispute, the inhabitants of one tithing do not vote in the election of churchwarden of another. None are chosen churchwardens of either of the tithings but such as are inhabitants of that particular tithing. *Berkeley* church is repaired by church rates levied separately on the tithings.

The description of boundaries was served 23d *November*, 1832, by the commissioners duly as regarded the parish officers of *St. Leonard*, *Stanley*, and the lords of the manors, but not on any churchwarden or overseer in respect of *Alkington*, as distinct from the rest of the parish of *Berkeley*. It was served on one *Seaborne*, who had been duly elected churchwarden of *Berkeley* town for the preceding year, but whose original year of office had expired, and who continued to act in consequence of the person appointed as his successor not having been sworn in.

The questions are, first, whether the Quarter Sessions ought to have received evidence as to the steps taken by the commissioner, and the other circumstances prior to his adjudication; secondly, whether they were entitled to require proof of the due service of the description of boundaries; thirdly, whether, if so, service on the churchwardens of *Berkeley* town was sufficient; fourthly, whether *Seaborne* could be considered as churchwarden.

The case was once argued upon the above statement, and after consultation, the Court sent it back to be re-heard on the following four points, viz. :—

1. Whether any custom prevailed respecting the churchwardens.
2. As to the precise form of the appointment.
3. As to the form of the oath of office.
4. Whether the churchwardens act out of their respective tithings.

And thereupon the following supplement was added to the case :—

1. By custom in the parish of *Berkeley*, divided as it is into the several tithings, (as mentioned in the case) there are four churchwardens, the customary mode of electing whom is as follows :—A notice is given in the parish church that the churchwardens desire a meeting in the vestry on *Easter Tuesday*, to choose churchwardens for the town and tithings for the year ensuing. At the meeting held in pursuance of such notice, an inhabitant of each tithing is separately proposed and nominated as the new churchwarden for such tithing. The churchwarden for the tithing of *Alkington* is usually

nominated first in order, and afterwards the rest, one after another. It is customary for the outgoing churchwarden of each tithing to propose his successor, and the person so proposed is usually nominated without opposition; but in case of opposition, then the successor is nominated by the majority of the inhabitants then present of the tithing for which he is to serve, and in this nomination the inhabitants of the other tithings never interfere. As far as living memory goes, each churchwarden has been an inhabitant of the tithing for which he served.

2. After the nomination of the churchwardens as aforesaid, a minute thereof is usually made in the form set out in the case for presentation to the archdeacon at his annual visitation. No other minute or appointment is made or delivered to any of the churchwardens.

3. They are all sworn in together at the archdeacon's visitation, the oath administered being in the following form:—

“ You and each of you shall swear truly and faithfully to execute the office of churchwarden within your parish, and according to the best of your skill and knowledge present such things and persons as to your knowledge are presentable by the laws ecclesiastical of this realm. So help you God and the contents of this book.”

4. No churchwarden ever acts out of the tithing for which he is appointed, except the signing the presentment annually made to the archdeacon of the state of repair of the church, and other presentable matters, which are signed by all four churchwardens, can be so considered. There is no church-rate made for the tithing of the town of *Berkeley*, but the church is repaired by rates out of the other tithings. When a sum of money is required for other expenses, towards which the church-rate is applicable, the parish clerk, who is also vestry clerk, divides the amount required into three equal parts, and makes a separate rate for each of the three other tithings for one-third, although the extent and value of such tithings are not equal. Such rate is allowed by the inhabitants of each of such tithings in vestry. The rate, when collected, is paid to the vestry clerk, who keeps separate accounts for each of the churchwardens, and such accounts are allowed by the inhabitants of each of such tithings.

The *Attorney-General*, and *Greaves*, in support of the order of sessions.— This is a question upon the General Inclosure Act, 41 *Geo.* 3, c. 109, s. 3(a). It is clear that the order of the commissioner is invalid, and that

(a) Which is in the following terms:— “ And whereas disputes may arise concerning the boundaries of parishes, manors, hamlets, or districts to be divided and inclosed, and of parishes, manors, hamlets, or districts ‘ adjoining thereto :’ be it therefore enacted, that the commissioner or commissioners appointed in or by virtue of any such (local) act, shall, and he or they is and are hereby authorized and required, by examination of witnesses upon oath or affirmation, (which oath or affirmation any one of such commissioners is hereby empowered to administer,) and by such other legal ways and means as he or they shall think proper, to inquire into the

boundaries of such several parishes, manors, hamlets, or districts: provided always, that such commissioner or commissioners (before he or they proceed to ascertain and set out the boundaries of such parishes, manors, hamlets, or districts,) shall, and he or they is and are hereby required to give public notice by writing, under his or their hands, to be affixed on the most public doors of the churches of such parishes, and also by advertisement, to be inserted in some newspaper to be named in such act, and also by writing, to be delivered to or left at the late or usual places of abode of the respective lords or stewards of the lords of the manors in which the lands

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the lands remain in *Alkington*; the rate levied on them in that parish is therefore good. Where a statute delegates a special authority to particular persons affecting the property of individuals, the statute must be strictly pursued, and what is done under it, must appear to be legal on the face of the proceedings; *Rex v. Croke* (a). It is not so here; the notice here was not left with the churchwarden of a parish, but only of a district. It lies on the defendant to shew that the power of the commissioner has been duly exercised, and that the requisites of the statute have been fully complied with. No such proof has been given. At all events it was open for the appellant to shew, that every thing had not been duly done, yet the sessions stopped that inquiry. Each district here has a separate churchwarden, and there ought to have been a separate notice for each. Every thing shews that the rights and powers of the officers of the different districts are to be separately exercised. The form of Mr. *Seaborne's* appointment is for the town and tithing, not for the parish of *Berkeley*. There is a manifest distinction between the two. He is churchwarden in, but not for the parish. There cannot be a churchwarden for the parish, for each is only appointed to office by a part of the parish. *Rex v. Clifton* (b) and *Rex v. St. Margaret's, Leicester* (c), shew that the acts of overseers of townships are invalid. The service of notice on a person who filled no other character is therefore bad, and the rate was properly made.

*W. J. Alexander and Cripps, contrà.*—The commissioner here has done all that lay in his power to comply with the provisions of the statute. The person served with the notice must be taken, under the circumstances of this case, to be the churchwarden of the parish. The Court will construe the general word "parishes," at the end of the section, as including the words "manors, hamlets and districts" used in the preceding part. Such a construction has been put upon the word "agreement," in the Statute of Frauds, *Saunders v. Wakefield* (d); the same rule of construction must be adopted here. Though each district separately appoints its own churchwarden, yet the oath administered to every one of the churchwardens is, to execute the office "within your parish," and in fact all the four sign the annual presentments made to the archdeacon on the state of the church. *Spitalfields v. Bromley* (e), which was afterwards cited and discussed in *Rex v. Bishop Wearmouth* (f), distinctly shews that magistrates are not bound to notice the divisions of parishes into townships. In *Rudd v. Morton* (g) it was held, that having a distinct overseer, and maintaining its own poor, was not sufficient to make a place a distinct parish. The churchwarden of *Berkeley* is the proper person to be served here, and he has been served.—[*Patteson, J.*—The act says the churchwardens and overseers.]—The commissioner is not bound to distinguish between them. The inhabitants of *Alkington* had no place where the notice

and grounds to be inclosed shall be situate, and of such adjoining manor or manors, ten days at least before the time of setting out of such boundary, of his or their intention to ascertain, set out, determine, and fix the same respectively: and such commissioner or commissioners shall, within one month after his or their ascertaining and setting out the same boundaries, cause a description thereof in writing to be delivered to or left at the places

of abode of one of the churchwardens or overseers of the poor of the respective parishes, and also of such respective lords or stewards."

(a) Cowp. 26.

(b) 2 East, 168.

(c) 8 East, 332.

(d) 4 Barn. & Ald. 595.

(e) 18 Vin. Abr. tit. *Removal*, H. pl. 5.

(f) 5 Barn. & Ad. 946 and 951.

(g) 2 Salk. 501.

could be given to them, as distinguished from the rest of the parish. They had not even a chapel in their district, but the inhabitants of *Berkeley* had a church. There can be no churchwarden but of a parish; a churchwarden, therefore, though elected by a part of the parish, has authority for the whole of it. The churchwarden is a corporation, and the goods of the church are vested in him, and he has not merely possession of them, but a property in them, *Jackson v. Adams* (a).—[*Patteson, J.*—In *Astle v. Thomas* (b), it was held that the churchwarden of a part of the parish might bring an action against his predecessor in that part of the parish for which he was specially elected, without reference to the churchwardens of the other parts into which the parish was divided.]—And *Rex v. Nantwich* (c) decided, that an indenture of apprenticeship of a pauper was valid which had been executed by the overseers of a parish that had no churchwardens or chapelwardens, but that maintained its own poor separately, although neither of the churchwardens of the parish at large, within which the township was situated, had joined in the execution. It is said by Lord Hale, in *Dawson v. Fowle* (d), that every parish had a right to choose its own churchwardens—none but a parish can have churchwardens. The mere fact, therefore, of each of the districts forming a parish-meeting in one vestry, and appointing its own officers, is nothing: they are all officers of the parish at large. Each township and tithing is here the same as the parish of which it forms a part.

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Lord DENMAN, C. J., afterwards delivered the judgment of the Court. The question in this case has arisen out of the ascertainment of the boundaries between certain parts of the parish of *Berkeley* and the parish of *Leonard Stanley*, in the county of *Gloucester*, under the third section of the General Inclosure Act, 41 Geo. 3, c. 109 (e), by a commissioner acting under that act, and an act of 11 Geo. 4, for the inclosure of the parish of *Leonard Stanley*, and it seems to us that the difficulty which has arisen is not attributable to any error or misconduct of that commissioner, but to the imperfection and confusion of the General Inclosure Act itself.

It certainly would seem probable, that the settlement of boundaries would be equally useful and necessary in the case of an inclosure taking place in a parish divided into many districts, as where a parish consists of one undivided district. And accordingly the earlier part of the third section recites that disputes may arise respecting the boundaries of "parishes, manors, hamlets or districts" about to be divided and inclosed, and for preventing or adjusting those disputes, the commissioner, under the powers thereby conferred upon him, is to settle the boundaries. Previously, however, to his executing this duty, he is to give several very formal and public notices to attract and insure attention to the manner of his performance of it. Subsequently to the commissioner's settling the boundaries, he is required by the act to give a notice to "one of the churchwardens or overseers of the respective parishes," omitting entirely any mention of the officers of the districts, and out of this omission the question before us has arisen.

(a) 1 Hodges, 339, and 2 Bing. N. C. 402.

(b) 2 Barn. &amp; Cress. 271.

(c) 16 East, 228.

(d) Hardr. 378.

(e) The General Inclosure Act.



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In the parish of *Berkeley* there are four districts called tithings, each of which districts, according to the statement in the case, has, as far back as memory goes, nominated a separate churchwarden, who, after his appointment, uniformly acts within and for his own district, "except signing the presentments made annually to the archdeacon of the state of the repair of the church, with other presentable matters, which are signed by all the churchwardens." They are also sworn to execute the office of churchwarden "within their parish." An inclosure having taken place within the adjoining parish of *Leonard Stanley*, the commissioner for settling boundaries had adjusted them between that parish and the adjoining part of the parish of *Berkeley* which lay in the tithing of *Alkington*, and in so doing had fixed certain lands, of which the defendant is occupier, to be in the parish of *Leonard Stanley*; and the single question is, whether the act of the commissioner was invalid. If it was so, then the lands would remain in *Alkington*, and the defendant would be properly rated for them, otherwise not.

The sessions properly, as we think, refused to hear evidence as to the giving, or the omission to give the preliminary notice, and reserved for us the question, whether a notice served upon one *Seaborne*, who had been appointed churchwarden for the tithing of *Berkeley*, was a service upon a churchwarden of the parish of *Berkeley*.

It is said that there is no such person as a churchwarden of the parish of *Berkeley*. If that objection be well founded, it follows, that it was impossible for the commissioner to comply literally with the provisions of the statute, for it has been already noticed, that no officer of a district is therein mentioned, and yet it cannot, we presume, be doubted, but that the case was clearly within the contemplation and objects of the statute. It has been urged, in furtherance of the objection, that the commissioner should have served a notice upon an officer of each tithing, or at least upon the officer of the tithing of *Alkington*. If he had adopted either course, we are by no means sure that he would not have been met by an objection exactly the converse of this, namely, that by law no such officer as churchwarden of a portion of a parish can exist.

Placed, therefore, as the commissioner certainly was, in a difficulty, in a case too where he certainly meant to act with good faith, we think that we should see very clear and convincing reasons for considering his act invalid before we arrive at that conclusion. And in the result, we are not so satisfied. Generally speaking, the churchwarden is peculiarly and emphatically a parish officer. The nomination may be, and not unusually is, by a portion of the inhabitants of a parish, or even by a person in the parish, but the office is not thereby affected, and the officer is still the churchwarden of and for the parish. We think that this may be considered as a somewhat unusual case of separate appointment and separate acting, without affecting the proper and legal character of churchwarden. It may have been an arrangement for some purpose of real or supposed convenience. The churchwardens are sworn in as for the parish. The acts before particularly alluded to are for the parish. The general and undoubted character of the office is for the parish.

Upon the whole, therefore, we are of opinion that the ascertainment of boundaries by the commissioner was, under these circumstances, well performed, and that the defendant was improperly rated in *Alkington*; the order of sessions must therefore be quashed.

Order of Sessions quashed.

REX v. The Vestrymen and Vestry Clerk of the Parish of  
ST. MARYLEBONE.

THIS was a rule calling on the defendants to shew cause why a *mandamus* should not issue, commanding them to permit and suffer *Charles Hibble*, and all and every person and persons rated to the relief of the poor of the parish of *St. Marylebone*, and all other persons mentioned or referred to for that purpose by the statute (1 & 2 Will. 4, c. 60,) made for the better regulation of vestries and for the appointment of auditors of accounts in certain parishes of *England* and *Wales*, to inspect and take copies of or extracts from the rate-books of the said parish, and all other books mentioned and referred to and declared to be at the seasonable time open to such persons by the said act, and why the vestry clerk should not pay the prosecutors the costs of and occasioned by this application. *Charles Hibble*, the applicant, stated in his affidavit, that the parish of *St. Marylebone* had adopted the provisions of the Vestry Act, 2 Will. 4, c. 60, and that the vestrymen of that parish were chosen under that act. On the 4th of *July* last a resolution passed the vestry to this effect:—"That no person be allowed to copy from the rate-books; and that agreeably to the 32d section of the Vestry Act, no person be allowed to inspect the books of the parish, unless he or she be a rate payer or creditor of the parish." The affidavit went on to state, that *Hibble*, being a rated inhabitant of the parish, subsequently made repeated applications at seasonable times to the vestry clerk at the Court-House of the parish for permission to inspect and take copies of or extracts from the rate-books of the parish; that inspection of the rate-books was allowed, but permission to take copies of or extracts from the rate-books was refused by the vestry clerk, upon the authority of the above resolution. The rate-books from which copies or extracts were thus required, contained an account of monies received for and on account of poor-rates and other parochial purposes. Similar applications by other rated inhabitants had also been refused. In answer to these affidavits, others had been filed by the defendants, stating that the rate-books of the parish did not contain a true and regular account of sums of money received and disbursed on account of parochial purposes, nor of the several matters for which such sums of money were received and disbursed: that the rate-books for the current year were not kept at the Court House, but by the several rate collectors of the parish, to whom they were respectively delivered on or about 1st *July* in each year, and in whose possession they remain until the 30th *June* in each succeeding year: that by the direction of the vestry, there was kept at the parish Court House, under the management of the vestry clerk, a book, in which true and regular accounts were entered of all sums of money received and disbursed for or on account of parochial purposes, and of the several matters and things for which such sums of money were so received and disbursed: that such book was at all seasonable times open to the inspection of any vestryman, or of any person or persons rated to the relief of the poor of the parish, or of any creditor or creditors on the same, without fee or reward; and that the said vestrymen and persons and creditors, or any of them, might take copies of or extracts from that book, or any part thereof, without paying any thing

The Court will not, upon any general principle of law, compel parish officers to allow a rated inhabitant inspection of certain books of accounts, nor to permit him to take copies of the same where the acts under which those books are kept do not distinctly give him the right to have such inspection and to take such copies.

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for the same. The affidavits distinctly denied that any such vestryman, person, or creditor, (specially naming the applicant) had ever made application or been refused permission to inspect the last-mentioned book, or to take copies of or extracts therefrom, on the 4th of *July*, or at any other time.

The *Attorney-General* shewed cause against the rule.—The only rate-book which is kept in the parish of *Marylebone* has been open at all times to the applicant and all other persons. That is a book regulated by the 17 *Geo. 2*, c. 38, s. 2 & 3. The other book is one containing a debtor and creditor account, and is kept under the 1 & 2 *Will. 4*, c. 60, s. 32 (a). It is not a rate-book, but a book something of a declaratory kind, now kept for the first time.—[*Patteson, J.*—The 17 *Geo. 2*, c. 3 (b), says nothing whatever of a rate-book, and the statute made in the same session, c. 38, directs that copies of the rates shall be entered in a book, but does not allow copies to be taken, but merely directs that “all persons assessed or liable to be assessed may freely resort thereto.” Neither one of these acts, therefore, will support the present rule (c).]—That is a *prima facie* answer to this application. The party applied for an inspection of the rate-books, and now he complains that he was not allowed to take copies of other books, not rate-books. There is a local act, the 35 *Geo. 3*, c. 73, which directs that all the rates are to be entered in books in a particular manner. It will perhaps be contended that the other side is entitled to an inspection of those books; if so, the present application is answered, for the party applying has never been refused what he now asks for. The present application relates to the rate-books of the said parish, and all other books mentioned or referred to as directed to be kept by the 32d section of the 1 & 2 *Will. 4*. The rate-books are not within that statute, which mentions only books where a debtor and creditor account is kept of the receipts and disbursements of the parish. The applicant, therefore, has not brought himself within any of the acts

(a) By which it is enacted, “That the vestry shall cause a book or books to be kept, and true and regular accounts to be entered therein of all sums of money disbursed for or on account of parochial purposes, and of the several articles, matters, and things, for which such sums of money shall have been so received and disbursed, which book or books shall at all seasonable times be open to the inspection of the said vestrymen, and of any person or persons rated to the relief of the poor of the said parish, and of any creditor or creditors on the same, without fee or reward: and the said vestrymen and persons and creditors as aforesaid, or any of them, shall and may take copies of or extracts from the said book or books, or any part or parts thereof, without paying any thing for the same.”

(b) By which it is enacted, “That the churchwardens and overseers of the poor, or other persons authorized as aforesaid, in every parish, township, or place, shall permit all and every the inhabitants of the said parish, township, or place, to inspect every such rate at all seasonable times, paying one shilling for the same, and shall upon demand forthwith give copies of the same, or any part thereof, to any inhabitant of the said parish,

township, or place, paying at the rate of sixpence for every twenty-four names.”

(c) But the first section of that act thus speaks of the accounts of parish officers, both as to money and goods:—“The churchwardens and overseers of the poor shall yearly and every year, within fourteen days after other overseers shall be nominated and appointed to succeed them, deliver in to such succeeding overseers a just, true, and perfect account in writing, fairly entered in a book or books to be kept for that purpose, of all sums of money by them received or rated and assessed and not received; which said account shall be verified by oath; and the said book or books shall be carefully preserved by the churchwardens and overseers, or one of them, in some public or other place in every parish, township, or place, and they shall and are hereby required to permit any person there assessed or liable to be assessed, to inspect the same at all seasonable times, paying sixpence for such inspection, and shall upon demand forthwith give copies of the same, or any part thereof, to such person, paying at the rate of sixpence for every three hundred words, and so in proportion for any greater or less number.”

relating to this matter. His application is too general in its nature, and the rule must be discharged.

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Sir *W. Follett*, and *Tomlinson*, in support of the rule.—This is a matter of importance, and if this rule is not made absolute, the intention of the legislature will be evaded. The dominant party in the parish has, for political purposes, refused the inspection of these books. Unless the rate payers have the means of taking copies of all these books, they cannot check the admission of improper votes on the register. The provisions of the 35 *Geo. 3*, c. 73, are certainly relied on in support of this application. That act directs the rates to be made, and the accounts to be kept in a particular form, so that the sums due and those received shall at once appear. The accounts thus made up are to be entered in a book, which is to be signed by the authority of the vestry in that form. That is the only parish book which contains an account of the receipts and disbursements of the parish.—[*Lord Denman*, C. J.—The rule speaks of copies of the rate-books. Must you not shew that they are within the 1 & 2 *Will. 4*, c. 60?—No other book has been kept which comes within the terms of the 1 & 2 *Will. 4*, c. 60, as containing an account of “the articles, matters, and things, for which the sums received and disbursed have been so received and disbursed.” The book or books of these accounts are therefore the only books referred to by that act; and inspection of them, and the power of taking extracts or copies, ought to be granted. The resolution passed on the 4th *July* is in contravention of that act, and is clearly void. The case of *Rex v. The Justices of Leicester* (a), distinctly shews that the rate-payers have a right to the inspection of all these books. The refusal to inspect rests on the resolution of the vestry, which is illegal. The rate-payers have a right themselves to take copies without payment of any fee; *Rex v. Staffordshire* (b). (The *Attorney-General* referred to *Lord Denman's* observations in that case to shew that the authority of *Rex v. Leicester* was doubted by the Court.—*Lord Denman*, C. J.—And we do doubt the case of *Rex v. Leicester*, and should wish to have the rule there laid down again considered.) That case is at least an authority for this purpose, that if the present rule has been framed in too general a form, the Court may mould it so as to meet the justice and necessity of the case. It may be that *Rex v. Leicester* carried the matter a little too far, still that objection does not hold here, and the rate-payers of *Marylebone* ought not to be deprived of the power of examining their rate-books and parish account books.—[*Patteson*, J.—One of the acts now referred to does not give the right to take copies, and then your local act does not say any thing of the inspection of the books.]—The provisions of the local act, it must be admitted, do not forward this application.—[*Patteson*, J.—No; you must rely on the general rule of the common right of all men to an inspection of the things for which they pay.—*Littledale*, J.—Are not copies of the rate entered in this book?—The book is signed by the justices, and there is no other original. The 32d section of 1 & 2 *Will. 4*, c. 60, will be quite inoperative if the rate-payers are not allowed the inspection of these books of accounts. The statutes of 17 *Geo. 2*, if they do not directly apply to this case, at least illustrate the doctrine laid down in *Rex v. Leicester*, namely, that parties interested in public books of accounts have a

(a) 4 *Barn. & Cres.* 891.

(b) 1 *Harr. & Wol.* 277.

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right to inspect them and have copies of them.—[*Littledale, J.*—With respect to the poor-rate, I feel inclined to say that you cannot carry the right further than under the provisions of those statutes; that you may perhaps have the copy of the rate, but not of the book.]—Then the whole object of the last act, which refers to books containing accounts of all monies received and disbursed for parochial purposes, is defeated.—[*Lord Denman, C. J.*—Is the refusal here sufficient, and are the vestrymen the proper persons to be applied to?—The local act says that the rate is to be made by them. Its produce is entered in the book as part of the monies received, and it therefore falls within the 32d section of the statute.

Lord DENMAN, C. J.—On the trial of an indictment arising out of the political disputes of this parish, I expressed an opinion that the inspection of these books ought not in propriety to be refused. I am still of that opinion; but the question, whether in point of law we can enforce the inspection, is another matter.

Cur. adv. vult.

Lord DENMAN, C. J. said,—We have already stated what we think would be right to be done by the defendants in this case respecting the production of the books, inspection of which is now demanded. The complainant says that he cannot obtain the information necessary for purposes relating to the registration of votes for the election of members to serve in parliament, unless he be allowed to take copies of or extracts from these books. Upon consideration, we think that neither by any general principles of law, nor by either of the acts of parliament referred to in the argument, can we be justified in making the rule absolute. The rule must therefore be discharged, but we think that it should be discharged without costs.

Rule discharged, without costs.

DOE d. WILLIAM LEWIS, JOHN MOTT, and ALEXANDER
 DOBIE v. JOHN BAXTER.

Where a judge tells a jury that if a certain fact is found one way the verdict must be for the plaintiff, but if the other, for the defendant, and such fact is found in the manner first supposed, the verdict must be entered for the plaintiff, though some of the jury should dissent at the time from such a construction of the finding, and the Court will not afterwards allow such entry of the verdict to be disturbed.

EJECTMENT for a house and premises in *Featherstone Buildings*, held by the defendant under a lease dated 11th April, 1834, in which there were the following covenants, for breach of which (among others) the lessors were to be at liberty to re-enter.

“No steam-engine, machine, or mill, shall at any time be used, erected, or set up in or on any part of the demised premises, other than the mill now used by the lessee in his business of grinding and preparing corn, or a mill of the like kind and power; and no act, matter, or thing whatsoever, shall at any time during the term be done in or upon the premises, or any part thereof, which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance of the lessors, or of the superior landlord or landlords, or any of their tenants,” &c.

At the trial of the cause before *Lord Denman, C. J.*, at the sittings at

Westminster after *Michaelmas* term, 1835, evidence was produced to shew that the defendant, at the time of granting the lease, and for some time previously, had ground corn upon the premises by a mill worked by hand. The mill was subsequently worked by a pony, which was said to be an annoyance of another and a greater kind than had existed at the time of making the lease. There was no direct evidence to shew whether any and what alteration was made in the power of the mill by this change of the moving power. In support of the plaintiffs' case, witnesses were called, who stated that the new mode of working the mill produced much more noise and disturbance than had ever been experienced before, and that this had been complained of to the lessors of *Baxter* by the occupants of the neighbouring houses, who were also tenants of the same lessors. Evidence of other alleged nuisances, by the painting words on the shop-front, and putting placards in the window, was also given. On the part of the defendant, evidence was adduced to shew that the noise and disturbance had not been increased by the employment of the pony as a motive power for the machinery; and it was further stated, that after a few days' trial of that power its use had been discontinued; and as to the other alleged nuisances, it was stated that they had been removed upon complaint. Lord *Denman* left two questions to the jury; first, whether the mill now complained of was the same mill or a mill of like kind and power as was in the shop at the time of granting the lease; and, secondly, whether the defendant had done any act, matter, or thing, which was or might be or grow to the annoyance, nuisance, or disturbance of the tenants, either by the working of the mill in a different manner, or by the painting on the boards, or by the placards in the window. If either of these questions was answered in the affirmative, the verdict was to be for the plaintiff; if both were found in the negative, the verdict was to be for the defendant. The jury retired to consider the verdict. After some time, Lord *Denman* and the counsel left the Court, and the Associate was directed to take the verdict. The jury brought in a written paper, finding that the mill was the same, but that there had been an increase of the noise in working the mill. The Associate said, then you find for the plaintiff? and he stated the verdict as a verdict for the plaintiff, Damages, one shilling. The foreman answered, "Oh! yes, nominal damages—no more;" but some others of the jury intimated that they did not intend to find for the plaintiff. A motion was subsequently made to set aside the entry of this verdict, and the affidavits in support of the motion stated that the verdict was not taken as the jurymen desired that it should be, and was not the verdict of all of them, for some of them had dissented from it at the time. No objection appeared to have been made at the time by the defendant's attorney to the verdict being thus taken, but the Court granted the rule, on the allegation that in fact all the jurymen had not assented to the verdict being taken as a verdict for the plaintiff, but had desired to find the fact, and take the opinion of the Chief Justice on the law as applicable to it.

Platt shewed cause against the rule, and contended, that after the manner in which the case had been left to the jury by the Lord Chief Justice, the finding that there had been an increase of annoyance was a distinct finding for the plaintiff, and that the Associate could not construe it in any other manner. No matter what the intention of the jury was as to the conse-

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quence of their finding of the fact; that finding was, so far as they were concerned, conclusive, and their intention could not be permitted to alter it. The verdict was rightly entered as a verdict for the plaintiff.

Andrews, Serjt., and *W. H. Watson*, in support of the rule.—It is not disputed that the jury found the fact that there had been an increase of the annoyance, but that finding was not intended as a general verdict for the plaintiff, but as a special finding of a fact, in order that the opinion of the Court might be taken on the law. The objection is, that instead of the finding being treated as it was intended it should be, as a special finding, it has been treated as a general verdict for the plaintiff. The defendant has thus been deprived of the benefit which he might have derived from a special verdict, and is therefore entitled to have the matter set right by the interference of the Court.

LORD DENMAN, C. J.—I am clearly of opinion that the finding of the jury was in effect a verdict for the plaintiff. My direction to them was, that they must find for the plaintiff if they were of opinion that any thing had been done by the defendant which had been an increase of annoyance in the working of the mill. After retiring to deliberate upon their verdict, they found that the annoyance had been increased during the application of the horse-power. Unless my direction to them was wrong in point of law, that was clearly a finding for the plaintiff. The Associate was bound to enter that finding as a verdict for the plaintiff. The jury, perhaps, felt unwilling to find a verdict for the plaintiff which would have the effect of working a forfeiture; but still they could not help finding facts, and those facts entitled the plaintiff to a verdict. If the jury had found the facts differently, and this Court had dissented from their finding as one against evidence, a new trial would have been granted, even though it was a case of forfeiture. If I had remained in Court, and been present when the jury came with this finding, I should have been bound to say that it was a verdict for the plaintiff; unless I was prepared to unsay all what I had said before. If, therefore, the jury had wished, as alleged, to take my opinion as to the law upon this finding of fact, I should have told them that their finding was a verdict for the plaintiff, and that it must be so entered.

LITLEDALE, J. concurred.—If the Lord Chief Justice had remained in Court when the jury had returned with the written verdict, he must have construed it as a verdict for the plaintiff. That was its necessary effect, and the terms in which it was expressed could make no difference. The only thing which the Lord Chief Justice could have done, had the jury dissented from such a construction of their finding, would have been to direct them again to retire and to re-consider the matter; and if then they had returned with a verdict for the defendant, that verdict might have been set aside as a verdict against evidence. Some of the jury, influenced perhaps by the hardship of the case, dissented from a finding for the plaintiff, but still all were agreed as to the finding of fact; and that finding of the fact was in effect a verdict for the plaintiff.

PATTESON, J.—Every verdict of a jury must be taken with reference to

the opinion and direction of the judge. Here the judge told the jury, in the words of the defendant's covenant, that if they were of opinion that he had increased the annoyance, they must find for the plaintiff. They find that the annoyance had been increased. That was a finding for the plaintiff on the fact, though some of the jury did not agree upon the law attaching upon it. This is nothing like a special verdict. It is a general finding of the fact, which being found in this way, was a verdict for the plaintiff. The Associate could do nothing but enter the verdict according to the Lord Chief Justice's direction.

WILLIAMS, J. concurred.

Rule discharged.

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REX v. The LONDON DOCK COMPANY.

THIS was a proceeding by way of claim for compensation under the *London Dock Act* (9 Geo. 4, c. 116). A *mandamus* had been issued and a special return made, and on the argument of that return, the Court directed the facts to be stated in the form of a special case. The case stated that the Company was constituted a corporation, and was authorized and empowered to make, complete, and maintain, in, through, over, across, and upon any lands, tenements, or hereditaments, vested in the Company under the authority of the act, "and the streets, lanes, ways, courts, alleys, and passages, situate and lying within the limits thereof, and according to such plan or plans, and in such manner and form as they should approve of, an additional entrance to and communication with the said docks from the river *Thames*, at or near *Shadwell Dock*, in the parish of *St. Paul, Shadwell*, in the county of *Middlesex*, with a basin or basins, lock or locks, cut or cuts, and all and every quay or quays, wharf or wharfs &c., and other matter or things necessary or proper to carry into effect the purposes of the act." The 50th section of the act empowered the Company to treat for the purchase of houses, buildings, lands &c., specified in the first schedule. By the 54th section, it was enacted, that it should be lawful, as well for every or any tenant in fee simple, fee tail, or for life or years, or other owner and proprietor, and also for every tenant at will, or from year to year, of any houses &c., to demand and receive of the Company a proper and reasonable satisfaction or compensation for the loss of the good-will of any trade or business which should be carried on on the premises, and also for tenants' fixtures and improvements, and for any other injury or damage which should be sustained in consequence of the execution of the act. The 57th clause authorized the impanelling a jury in case parties should not accept the compensation offered by the Company, which jury was to assess and ascertain, and give a verdict for the compensation, if any, which should be made in respect of good-will, improvements, or any injury or damage whatsoever to be sustained by any corporation, or person or persons interested therein. By the 81st section, the Company was empowered, though not compelled, to purchase the premises mentioned in the second schedule. By the 83rd, the Company had power to clear the ground and sell the materials; and by the 84th and 85th sections, to stop up the streets within a boundary, and

A dock act gave a Company power to purchase houses &c., stop up streets, make cuts, and do other things necessary to carry the object of the act into effect; and it provided, "that if any person having an estate or interest, not less than a tenancy from year to year, in any houses, lands, or hereditaments, should be injured in his, her, or their said estate or interest by the making of any such cut &c., he, she, or they should be compensated." Two parties claimed compensation in respect of the destruction of the business of a public-house by the removal of the neighbourhood and the stopping up of the ways:—*Held*, that this was not such an injury to "estate or interest" as to entitle them to compensation.

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such as were comprised within the first schedule, except *New Gravel Lane*, and, by consent of two justices, to alter and divert highways. The 89th section provided, "That if any person or persons having an estate or interest not less than a tenancy from year to year, in any houses, lands, or hereditaments, shall be injured in his, her, or their said estate or interest, by the making of any such cut, sluice, bridge, or road, or other work, every such person or persons shall be compensated by the Company for such injury, and such compensation shall, in case of disagreement, be ascertained by a jury in the manner herein directed for ascertaining the value of premises to be taken by the Company under the authority and for the purposes of the act."

William Hartree and *Ann Lammiman* (the parties on whose application these proceedings were taken) were the surviving trustees in fee of a certain messuage or tenement, public-house and premises, called the *Wheatshaf*, in *Star Street*, and *Ann Lammiman* was tenant for life of the same premises for her own use and benefit, and had been in the occupation thereof, as such tenant for life, since 1827, and carried on the trade or business of a victualler therein. This messuage or tenement was included in the first schedule, and it appeared that its situation was in the midst of a great number of thoroughfares, with approaches to it in all directions, and *Star Street* itself, in which it stood, was a much frequented thoroughfare for persons passing from *Shadwell High Street* to *Wapping Wall* and the river *Thames*, and that such persons are now confined to only one approach from the north of *New Gravel Lane*.

The *London Dock Company*, in pursuance of and in execution of the act, purchased a great number of the houses, &c. comprised in the first schedule. The Company also, in pursuance of and in execution of the powers given by the act, made the additional entrance to the docks from the river *Thames* at *Shadwell* in the act mentioned, the same consisting of a cut with locks, and such other works as were necessary for carrying into effect the purposes of the act, together with bridges for horses, carriages, and foot-passengers across the cut at *New Gravel Lane* and *Fox Lane*. The cut is not, nor are any of the works executed by the Company in any way contiguous to the messuage or tenement in question.

In consequence of the Company's having pulled down such houses and buildings under the act, and destroyed the streets, courts, lanes, and alleys, which comprised the same, *Ann Lammiman*, as the occupier of the public-house in question, lost several customers who had been inhabitants of houses so pulled down, and had been in the habit of frequenting her public-house; and it was stated, that by reason of such pulling down of the houses, the neighbourhood of *Star Street* had become less populous than it used to be, and in consequence thereof, and of the stopping up of the several streets, and of destroying the direct thoroughfare through two streets, and the indirect thoroughfares from several other streets, part of the casual and local custom of the public-house had become lost to *Ann Lammiman*, and by these means the profits of the business carried on by her had been diminished, and the good-will of the trade or business lessened in value, and the pecuniary value of the premises, either to sell or to let as a public-house or shop, but not as a private residence, had been considerably reduced.

The additional entrance was carefully and properly made by the Company,

and the several acts and works of the Company were all necessary and proper for the completion thereof, and for carrying into effect the purposes of the act, and in executing the same the Company had done as little injury to the property and interests of other parties as possible, in order to carry the same into effect.

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If, under these circumstances, the Court should be of opinion that the injuries above-mentioned entitled the owner or occupier of the messuage to a compensation from the *London Dock Company*, a peremptory *mandamus* was to issue; if of a contrary opinion, the rule was to be discharged.

Kelly, for the Crown.—The first question which the Court has to decide is, whether the parties here have an interest sufficient to enable them to make this application. It is clear that they have; for they possess, within the words of the act, “an estate or interest not less than a tenancy from year to year.” The next question then is, as to the meaning of the words “injured in his, her, or their said estate and interest.” It is clear that these parties have been injured by what the Company has done. *Mrs. Lammiman* was carrying on a good business; that business has been destroyed by the taking away of the streets near to and adjoining her house; customers can no longer come to her house, except by more distant and less convenient ways. She has thus not only lost the custom of the persons who resided near her, but of those persons who came through those streets to her house. Compensation is to be given for the value as well as the duration of the interest, and the value here is proved to have been materially diminished. That value must be measured, first, by the price for which the premises would have sold before the alteration, as compared with what they would sell for now, and next, by the difference in the money taken in the business before and after the alteration. It is not meant to be contended, that the loss of what is called good-will can be made the subject of compensation. No demand is made in respect of good-will, or what the business would have sold for. That might be a matter depending on calculation; but the loss here is a loss arising upon an existing business—it is capable of positive proof. The powers possessed by the Company were given on condition of making good the losses suffered by individuals from the exercise of those powers. This is a loss so occasioned.—[*Coleridge, J.*—If the Company had bought the soil, and pulled down the houses, do you mean to contend that compensation must have been given for the loss of the custom of those persons who were obliged to remove from the neighbourhood because of the houses being pulled down?—The case supposed and the present case are not exactly alike. Here the Company has stopped up the former public ways, and *Wilks v. The Hungerford Market Company* (a), shews that compensation must be made for an injury consequential on such stopping up.—[*Coleridge, J.*—In that case, the plaintiff recovered in consequence of the Company having exceeded the powers given to it by the act. That is not the case here.]—But the act does not give compensation solely in cases where the powers it confers have been exceeded, but where injury has been suffered from a proper exercise of those powers.

Sir F. Pollock, contra.—The argument on the other side is too general, and, if fairly carried out, there would be no loss whatever, however indirect

(a) 1 Hod. 287, 3 Bing. N. C. 281.

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or consequential, for which a public company would not be liable to make compensation. If the argument on the other side can be supported, then, a street like *Regent Street* could not be built by a public company without compensation being claimed by the inhabitants of a neighbouring street like *Bond Street*, on the ground that their interests were affected by the creation of a new thoroughfare. Again, if a company undertook to improve the north side of *St. Paul's Church-yard*, the inhabitants of the south side might say that the traffic on their side was lessened, and might claim compensation. Such imaginary injuries as these the legislature never intend to compensate. It is not a consequential and doubtful, but a clear and direct injury, that is the subject of compensation; *Rex v. The Commissioners of Nene Outfall* (a). That case was stronger than the present, for the injury there was the direct and necessary consequence of the act of the commissioners, who had taken some arable land and covered it with water, yet the Court held that the vicar was not entitled to compensation for the tithes which he thereby lost. The claim here, however denied in terms, is in substance a claim for the diminished value of the good-will of the business. The value of the house itself, independently of the business, remains at least as great as before. An answer has been already given to the case of *Wilks v. The Hungerford Market Company*. There the Company had exceeded the powers of the act, and the plaintiff recovered damages for that excess. No excess has been committed here. Wherever the legislature has intended to compensate a distant consequential injury of this kind, it has distinctly declared such intention. It did so in the act for the formation of the *West India Docks*, with respect to the injury to the business of the wharfs along the side of the river. It has not done so here, and the omission, therefore, is a clear proof that no such compensation was intended to be given.

Kelly, in reply. No compensation is asked for good-will, but for the loss of an existing and successful trade. The return here is, that the premises are reduced in value as a public-house or shop. The present claim, therefore, is justified by the very words of the return. The Company has stopped up the ways and rendered the premises less valuable than before.—[*Lord Denman*, C. J.—The 84th section relates to the stopping up of the ways, but gives no claim for compensation. The 85th gives the Company power to make roads. The 86th, to cause sewers and drains to be arched over. The 87th, to make sluices; and then comes the 89th, declaring, that any person who is injured in his estate and interest “by the making of any such cut, sluice, bridge or road, or other work,” shall be compensated; must not the word “such” have some meaning, and must it not, therefore, refer to the things described as made in the former sections.]—All that was done was part of the making of such cut, and is therefore properly the subject for compensation.—[*Palleson*, J.—That might be so if any person was injured by it, but according to your argument, persons living in the neighbourhood must of necessity be injured.]—There is no doubt that the applicants have been injured here. The character of the house ought to be considered in awarding compensation. Thus, a wharf ought to be the subject of compensation in respect of its trade, though not in respect of the sum which the sale of the trade might probably fetch in the market. That is the distinction between trade and good-will taken in this

(a) 9 Barn. & Cress. 875.

case. Here the trade itself has been destroyed. The parties have been injured in their interest in the house, and are entitled to compensation. The general words of this act are sufficient to include a claim of the sort now made.

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The judgment of the Court was in *Trinity* term delivered by

LORD DENMAN, C. J.—This case was argued in the course of last term, on a return to a *mandamus*. The question was, whether any compensation was given by the 9th Geo. 4, c. 116, s. 89, for the consequential injury which the prosecutors of the writ had suffered in their interest in a certain house occupied by one of them as a public-house, by certain acts of the Company. It is proper to state distinctly the nature of the injury for which the prosecutors sought compensation. It was for an injury which, it was alleged, had arisen by the destruction of the neighbourhood by the formation of the basin and cut of the Company, on ground formerly covered with houses, and by the stopping up of certain thoroughfares which passed near the house in question, and which offered convenient and ready access to that house. By this act of the Company, the custom of the house was diminished, and its pecuniary value to let or to sell, as a public-house, was also lowered. The question was, whether the Company had, by making the cut, &c., injured the complainants in their estate and interest? In the argument of the case, not much stress was laid upon the loss of neighbourhood, as indeed it was clear that the Company had the power to pull down the houses. It was conceded also, that the injury to the good-will was not a substantial injury for which the party was entitled to compensation; but it was alleged that the stopping up of the ways and roads by which the owner had the most convenient communication with her house, and thereby compelling the customers to go a more circuitous route, was an injury to the owner, and being so, the amount of the usual receipts before and after the passing of the act might be considered, as shewing the *quantum* of damage. In support of this argument the case of *Wilks v. The Hungerford Market Company* was confidently relied on. We see no ground to dispute the validity of the decision in that case, but it has no bearing on the present. The objection to what had been done there was, that the Company had exceeded its power, by keeping the passage stopped up for an unreasonable time, by which the plaintiff was damnified. In the present case there are express words in the act of parliament authorising the Company to do the act from which the injury is alleged to arise, and if the injury, by diminishing the value of the house to let or sell as a public-house, be put out of the question, as it was in substance conceded that it might be, for a claim for good-will was expressly disclaimed, there appears to us to have been no injury sustained. We must decide this question on the words of the 89th section, calling in aid the other provisions of the act, and proceeding on that principle, we see nothing in the act to warrant us in saying, that this was an injury within any reasonable construction of any of its provisions. The inconvenience was an injury in common to the whole neighbourhood, more or less, but it was the necessary consequence of a lawful act done by the Company. It was impossible to make the cut and basin without stopping up the ways and destroying the neighbourhood, and this necessary consequence must have been foreseen by the legislature, and if it had been in-

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tended to have given any compensation, it is hardly to be conceived that language would have been used so little applicable to a case like the present, as the language of the 89th section. It is proper to read that section as intended to provide for unforeseen injury of a direct and positive kind to the estate and interest of any individual, as if by the works the Company had weakened the foundation of houses, darkened the lights of windows, and caused injuries of that kind to any house in the neighbourhood. The object of the section evidently was to give compensation for such injuries, but to exclude any vexatious claims that were likely to be made on account of trifling injuries. Upon the whole, we are of opinion that the claim now put forward cannot be sustained as for an injury to the estate and interest of the party, within the meaning of the 89th section, and therefore that the rule for a peremptory *mandamus* must be discharged.

Rule discharged.

TYLER v. BENNETT.

An interest in the water appurtenant to a dwelling house is an interest in land, and where such an interest comes in question, the Court will allow the plaintiff full costs, notwithstanding a certificate that the damages were for a sum less than 40s.

THIS was an action of trespass. The declaration contained several counts. The first count was for disturbance in the use of the water of a pump which the plaintiff claimed as appurtenant to his dwelling-house. The other counts are not material to be considered. The defendant pleaded two pleas: first, not guilty; second, denying title. At the trial of the cause, at the last assizes for *Glamorgan*, the plaintiff proved, that in virtue of his occupation of the dwelling-house, he had a right to draw water from the well, and that he had been disturbed in the exercise of this right by the defendant. The jury returned a verdict for the plaintiff,—Damages 1s. The learned judge before whom the cause was tried certified, under the statute of *Eliz.* that the damages recovered were less than 40s. A rule had since been obtained, calling on the defendant to shew cause why the Master should not tax the plaintiff his full costs notwithstanding the certificate.

Chilton shewed cause. The mere right to draw water from a well is not a title or interest in land, yet this mere right was all that was proved at the trial, and the damages given were under 40s. This, therefore, is clearly a case within the statute of *Eliz.* The right to draw water from a well is a mere easement, like a right to a light. *Edmondson v. Edmondson* (a) will probably be relied upon by the other side. That was a question as to the right to take turves, and it must be admitted that the opinion of the Court there seemed to be, that if that question had properly been put in issue by the pleadings, it would have been a case respecting an interest in land. But there is a great distinction between that case and the present. The right to take turves is a profit *à prendre*, which is very different from the mere use of water in a well. The latter is a personal right which some party has in consequence of the possession of land, but it is not a right to land, or a title or interest in it.

Sir *W. Follett* and *J. Evans*, in support of the rule, were stopped.

Lord DENMAN, C. J.—An interest in the water of a well appurtenant to a dwelling-house, is an interest in land.

(a) 8 Rast, 294.

LITLEDALE, J.—It is so certainly, though not so stated in this declaration.

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PATTESON, J.—In *Edmondson v. Edmondson* it was not doubted, that if the right to take the turves had come in question, it would have been an interest in land.

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Rule absolute.

SERJEANT and others, Executors of SERJEANT, v. CHAFEY.

REPLEVIN. *Avowry* for taking the goods as a distress for rent due in respect of a holding under the terms mentioned in a lease granted by one *H. Abbott* to the testator of the plaintiffs, at a rent of 650*l.* a-year. *Plea*, denying the tenancy. The lease in question was granted on the 1st November, 1819, for fourteen years wanting a few days, and ending 11th October, 1833. At the time that this lease was granted, the outstanding term was in mortgage. In 1828, Dr. *Chafey*, the defendant, became seised both of the legal and equitable estate in the premises. Before the conveyance was made to him, he gave notice to the tenants to pay rent to him. He subsequently brought an action against these plaintiffs, and they suffered judgment by default. The question of their continuing in occupation of the premises was then made matter of arrangement, and they continued. At the trial of this cause before *Coleridge, J.* at the Spring Assizes for *Worcester* in 1835, the great question in dispute was, on what terms the plaintiffs had continued to occupy the premises. The plaintiffs contended that it was upon a rent of 500*l.* a-year, and subject in other respects to the terms mentioned in the lease granted to the testator. The defendant insisted upon 650*l.* as the amount of the rent. The learned judge left the question of fact to the jury, who returned a verdict, finding that the rent was 500*l.* a-year, and that the holding was in other respects subject to the conditions mentioned in the lease. An application was then made to the learned judge to amend the *avowry*, by inserting 500*l.* instead of 650*l.* The application was refused.

In order to entitle a party to have judgment entered for him under the 3 & 4 *W. 4, c. 42*, "according to the very right and justice of the case," he must apply to the judge who tries the cause to amend the pleadings before the verdict has been pronounced. After verdict it is too late.

The Court will not give a party the advantage of a new trial, merely because in his particular case the new rules may operate injuriously upon him, especially if he might have avoided such an effect by adopting a different mode of proceeding.

This Court will not take notice of a short-hand writer's notes of a judge's summing up, though verified by affidavit; it will only refer to the notes of the judge himself.

A rule had been obtained calling on the plaintiffs to shew cause why, under the 3 & 4 *Will. 4, c. 42*, judgment should not be given according to the justice of the case, or why the defendant should not amend his *avowry* according to the finding of the jury, by entering a claim for a rent of 500*l.* per annum instead of a rent of 650*l.* It was argued, that as the defendant was not under the new rules permitted to plead a second *avowry*, and as the amount of the rent might be doubtful, he was precluded by the technical rules of law from putting on the record a full defence, and that the Court ought now to compensate for this evil by entering up judgment for him according to the very right and justice of the case.

Richards, shewed cause.—In the first place, he wished to call the attention of the Court to the fact, that the rule was expressed to be granted upon reading the short-hand writer's notes of Mr. Justice *Coleridge's* summing up, verified by affidavit.—[Lord *Denman, C. J.*—I ought at once to say, that we think we cannot rely on the notes of a short-hand writer for any purpose of shewing what was the summing up of a learned judge. The short-hand

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writer's notes may be a most accurate report of what passed as to expressions, and yet present a very incorrect notion of the learned judge's meaning. We can rely on his notes alone for an account of his summing up.]—The whole struggle in this case was as to the amount of rent reserved. The plaintiffs will be made to suffer unjustly from the defendant's own conduct, if this rule should be made absolute, for if the defendant had avowed for a rent of 500*l.* a-year, the plaintiffs would have shewn payment of all that ever became due. There is this difficulty in permitting the proposed amendment. The sureties here are parties to the cause, and they ought not to be prejudiced.—[*Patteson, J.*—Suppose that there had been a motion for a new trial, we should have granted or refused it without reference to the sureties.] That would have left the matter still open as before on the fact, but here, notwithstanding the fact, the Court is asked to enter a verdict for the defendant. The Court has no power to grant such an application. This amendment cannot be made without going into the accounts between the parties, which is a thing that this Court will not do.—[*Patteson, J.*—The statute 3 & 4 *Will. 4*, c. 42, is quite out of the question here, for there was not within the terms of its provisions any application, before verdict given, for an amendment, and a refusal to make such amendment to the verdict. The statute clearly limits the right to make such applications to a period antecedent to the verdict.]—Then if not within the act, this Court has no power to make the proposed amendment.—[*Lord Denman, C. J.*—We all think that this rule must be remodelled, so as to meet the object we intended when we granted it. There is no doubt that the application under the 3 & 4 *Will. 4*, c. 42, cannot be maintained. The rule now must be considered as a rule for a new trial.]—Then there is no pretence for such a rule. The only question in the cause was fully left to the jury, and the verdict is completely borne out by the proof. He was stopped.

The counsel who were to have been heard in support of the rule were not present.


LORD DENMAN, C. J.—The application here is to remove an inconvenience which is said to have resulted to the defendant from the new rules. It seems that he has been mistaken as to the amount of the rent, and has stated it at a larger sum than is correct. We have been asked to amend this mistake according to the fact proved at the trial. It is possible, that if made in proper time, a motion such as this might be complied with, but it is too late now; and, considering that from first to last the defendant has chosen to rest his case upon the very point, and has resisted a reference on this issue, it does seem to me that this is not a case for us to interfere. I am of opinion that these new rules work well, and nothing can be more reasonable than to suppose that parties must know their own contracts, and must be able to state them truly. The defendant here has not been precluded from succeeding, where he had a right by the new rules, but by his own conduct.

LITLEDALE, J. fully concurred.

PATTESON, J.—This rule must be discharged. The case was originally put as if the defendant had not the liberty to plead a second avowry. In

fact that was not so, for the avowry was pleaded before the new rules came into operation. But even if they had been in operation before the avowry had been put on the record, the defendant would not be entitled to the assistance of the Court; he has thought fit to take his chance of recovering the larger rent, and has failed. He must submit to the consequences. The application to amend ought to have been made before verdict, and the Court cannot now give the defendant the benefit of such an application in the shape of a rule for a new trial.

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COLERIDGE, J.—The way in which this case was put by the defendant's counsel when the rule was obtained, amounts to raising this question, whether the Court will or not uphold the new rules, or will make them give way whenever by any accidental circumstance, not the necessary consequence of the rules themselves, they happen to press hard upon a particular party. If this were to be done, the new rules had better be expunged altogether from the books. I meet the question, therefore, directly, and I say that we are prepared to uphold the new rules: that we will not depart from them, nor put the practice of pleading again into its former state. The whole difficulty in this particular case has been brought on the defendant by his own act, and he has no title to claim the interference of the Court to enable him to try this same question on a fresh issue.

Rule discharged.

REX v. WILLIAMS, SANKEY and others.

A RULE had been obtained by a Mr. Downes, as town clerk of the town and borough of *Ludlow*, for a *mandamus* to be directed to the late bailiffs of *Ludlow* and the late town clerk, commanding them to deliver over to the present town clerk all books, books of account, bills, securities, muniments, records, and papers, of and belonging to the corporation of *Ludlow*, or relating to the property thereof. In answer to the application, affidavits were produced stating that the bailiffs had not refused to deliver over any books or minutes, except such as related to estates vested by charter in the old corporation, "in trust to keep and continue a grammar-school in the town of *Ludlow*, for educating and instructing children and youth in grammar; the school to be kept by one master and one usher, and also to keep and maintain, with the issues and profits of the said premises, thirty-three poor indigent persons within the said town of *Ludlow*, giving to every of them fourpence every week, and also one chamber for every one to live in; and also that a discreet and able person, learned in holy writ, should be appointed preacher of the said town; and that another able and fit person should be chosen to be assistant to the rector of the church of *Ludlow*, both which persons should be for ever sustained and maintained out of the issues and profits of the said premises." It was also stated that the town clerk had delivered up all documents &c., except such leases and counterparts as had come to his hands as solicitor to the corporation, upon which he claimed to have a lien for money paid and business done for the corporation as solicitor to the corporation.

A person who is both town clerk and solicitor to a corporation, may have in the latter character a lien on corporation papers. This Court will not issue a *mandamus* to such a person to deliver up books and writings said to belong to the corporation, if he claims as solicitor to have a lien on them.

It seems that the 66th section of the 5 & 6 Will. 4, c. 76, applies to charges voluntarily created by a corporation: and the 71st section, to estates left to the corporation by other persons for charitable purposes.

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The *Attorney-General*, Sir F. Pollock, and *Cleasby*, shewed cause against the rule on behalf of the late town clerk.—The only papers refused by the late town clerk to be delivered up, are those which came into his hands as solicitor to the corporation, and on which he has a lien. His claim of lien is not as town clerk, but as a solicitor, and the fact that he was also town clerk will not deprive him of the right to it. The lien depends not on the character of the employer, but on the nature of the employment.

Sir W. Follett, and *Chandless*, shewed cause on the part of the bailiffs of *Ludlow*.—There is no proof that the bailiffs have in their custody any papers or documents to which they are not entitled for the purpose of carrying into effect the trusts thereby created. The right to any estate vested in the whole or in part in the corporation for charitable purposes, remains, under the 71st section of the Municipal Reform Act, in the old trustees, and the bailiffs here are the old trustees, so that there is no ground for an application against them. Even, however, if they did possess any deeds of the corporation, which they were not entitled to retain, a *mandamus* would not be the proper remedy. Trover will lie for public deeds, and as that is the case, the Court will leave the party now applying to his civil remedy.

Maulc and *Erle*, in support of the rule.—These papers and documents were received by one of the defendants as town clerk, and he cannot, because he happened also to be solicitor, claim a lien over them. As to the other defendants, it is clear that this *mandamus* must go. The 68th section of the 5 & 6 Will. 4, c. 76, makes the borough liable for all pensions and allowances, and for "all stipends which, during seven years next before the 5th of June, 1835, have been usually paid and granted to the minister of any church or chapel, the master or usher of any school, or the governor or master of any hospital within such borough." The property, therefore, in all deeds relating to such stipends and allowances must be in the existing corporation, and to its officer such deeds should be delivered up. In the 71st section, the body corporate is spoken of as "seised or possessed for any estate or interest whatsoever, of any hereditaments, or any sums of money &c., in whole or in part, in trust or for the benefit of any charitable uses whatsoever;" and it is directed, that for a certain time the right of such body corporate shall continue in the persons entitled at the passing of the act. The application of the words "in whole or in part" may be doubtful, but it is submitted that they must be construed to mean, that where the corporation is seised of part, and other persons are also seised of part as trustees for charitable uses, that the right shall continue in the old corporation. That is not shewn to be the case here, and the right therefore passes entirely from the old trustees to the new corporation.

Lord DENMAN, C. J.—It appears to me there is no ground for this rule. I cannot doubt that a person who is town clerk and attorney has a lien as attorney upon papers in his possession for business done in his professional character. As it seems to me, there is no possession by any of the parties but him, and no refusal by him to call for our interference, for he claims to hold the papers for a particular purpose, namely, because he says he has a lien upon them for business done. His retaining them under such circum-

stances is nothing but what he had a right to do, and his claim of lien justifies him in not delivering up possession of these documents. On the whole, therefore, I think that this rule ought to be discharged, and with costs. The question under the 68th and 71st sections does not arise; but if it did, I own I should be inclined to think that the 68th section related only to pensions and allowances granted by the corporation, and not to any payments of a charitable nature created by trust-deeds. The subject-matter of the 71st section is property secured for charitable trusts, and these are to be regulated on application to parliament or to Chancery.

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LITTLEDALE, J.—The town clerk would not have a lien upon books and muniments which he has the possession of in his capacity of town clerk. But with respect to title-deeds which have come into his possession to advise upon, or by which to draw leases, he has a lien upon them as much as any other solicitor. It rather appears to me that the 68th section only applies to pensions granted by the corporation, independent of any estate; and the 71st section applies to any estates which the corporation held in trust, either in the whole or in part for charitable purposes. The members of the old corporation hold such estates as trustees until it has been determined by parliament or the Chancellor what is to be done with them. There is therefore no ground for the present application against the bailiffs.

PATTESON, J.—I cannot doubt that the town clerk to a corporation, who is also solicitor or attorney to the corporation, and transacts business for it as such attorney, would have a lien upon all such books and papers as came to him in that capacity, notwithstanding that he is town clerk. I do not mean to say that he has any upon such deeds as he is in possession of merely as town clerk. A distinction has been taken between a town clerk and a solicitor, but the same distinction exists between a steward of a manor and a solicitor; yet a solicitor, who was steward of a manor, might have a lien on papers relating to a manor which came into his hands as a solicitor. In *Worrall v. Johnson* (a), as here, there was a claim to retain on a lien, the defendant having been steward of a manor and solicitor, and the claim was allowed. As there was a claim of lien set up here, which was not denied, but acquiesced in, I cannot see that what has taken place here has been any refusal on the part of the town clerk to deliver up deeds, and the rule must therefore be discharged, and with costs; not however because there was no refusal, but because he had answered the application, and that answer was not communicated to the Court when the rule was moved. With respect to the other parties, it is doubtful whether they have any deed in their hands or not; if they have, they hold it claiming under the 71st section, and Mr. *Downes* holds it as their attorney and solicitor. As to the other point, we are not compelled to put any construction to the 68th section; but, if required to do so, I should agree with my lord and my brother *Littledale*, and say that it applies to such charges as the corporation has created voluntarily, and that the 71st section is intended to apply to estates left by other persons to the corporation for charitable purposes in part or in whole; that is, whe-

(a) 2 Jac. & Walk. 214.

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ther partly or wholly for charitable purposes, and not whether they are partly in the hands of the corporation and partly in the hands of other persons.

WILLIAMS, J. concurred.

Rule discharged, with costs.

BIRD v. HIGGINSON (a).

To a special action on an agreement with an account stated, the defendant pleaded, first, *non assumpsit*; secondly, that the agreement was obtained by fraud and covin; and, thirdly, that the agreement was void, being an agreement for an interest in land, and not being under seal. The plaintiff took issue on the two first pleas, and demurred to the last. The cause was tried, and the plaintiff recovered a verdict with damages on the issue as to fraud and covin, but gave no evidence of an account stated, and the defendant therefore had a verdict on the *non assumpsit*. The demurrer was subsequently argued, and judgment given for the defendant. The Master allowed the plaintiff the general costs of the cause on the issue as to the fraud, deducting from them the costs on the issue found for the defendant and the costs of the demurrer:—*Held*, that the Master had properly allowed these costs:—*Held*, also, that a party entitled to the costs of the pleadings on any issue found for him, is entitled to all other expenses incidental to those pleadings.

Where an issue is to be tried and a demurrer to be argued, the plaintiff need not delay trying his cause till the demurrer has been decided; and if the issue is found in his favour, and the demurrer is decided against him, though that demurrer may go to his right of action, he will still be entitled to the costs of the issue.

THIS was a question of costs. It was argued in *Hilary* term by *Kelly* for the plaintiff, and by the *Attorney-General* for the defendant, and time taken to consider the arguments. On the last day of this term judgment was delivered. The facts of the case, and the points submitted for the consideration of the Court, are so fully referred to in the judgment, that it has been deemed unnecessary to repeat them here.

Lord DENMAN, C. J.—This was an action for the non-performance of an agreement. The first count of the declaration stated the agreement. There was then a count on an account stated. The first plea was the *general issue*; secondly, that the agreement was obtained by fraud, covin, and misrepresentation; and, lastly, that the agreement was void in law, not being under seal. There was a traverse of the first special plea and a demurrer to the other. The cause was tried before the argument on the demurrer, and at the trial a verdict passed for the plaintiff, damages 200*l.*, costs 40*s.*, on the issue as to the fraud, and no evidence was offered on the *non assumpsit*. The demurrer was subsequently argued, and judgment was given for the defendant. The parties then went before the Master on the taxation of costs, and the defendant said, that as the agreement in question was declared upon the argument on the demurrer to be void, and as there was a verdict for him on the account stated, there had been a complete answer to the whole declaration, and therefore the issue on the fraud was a nullity, and the plaintiff ought not to be allowed the general costs of the cause. On the other hand, the plaintiff claimed the benefit of the *postea*, and insisted that he was entitled to the costs of the cause, subject to a deduction on account of the issues found for the defendant. The Master allowed the plaintiff the general costs of the cause on the issue on the plea of fraud, deducting from them the costs upon the other issue and on the demurrer. *Cooke v. Sayer* (b) was referred to for the purpose of shewing, that as the defendant had the general judgment, he could not be liable to the costs of trying the issue of fraud. That case was almost exactly the same as the present. There the plaintiff brought an action for criminal conversation. The defendant pleaded not guilty, and not guilty within six years. The plaintiff took issue upon the first plea and demurred to the second. The trial of the issue came on before the argument upon the demurrer, and the plaintiff obtained a verdict and damages. The demurrer was then argued, and the defendant obtained judgment. The parties came to the Court for directions to the Master as to

(a) See the case reported on the argument upon demurrer, *ante*, vol. i. p. 61.

(b) 2 Burr. 753; 2 Wils. 85.

the manner in which he was to tax the costs. After the case had been argued, the Court took time to consider it, and then declared that the defendant was to have the costs of the demurrer, which had been decided in his favour: that as to the costs of the trial, the plaintiff was not to have them, because he had no cause of action; nor ought the defendant to have them, because the plea had been found against them. That case, if rightly decided, ought to govern the present. But in *Yates v. Gun* (a), a similar question came under the consideration of the Court of *Common Pleas*, and received a different decision. In that instance, as here, the cause was tried upon the issue of fact before it was decided on the demurrer. "The plaintiff had a verdict on the issue, and the defendant a judgment on the demurrer; plaintiff moved for the costs of the trial. The Court ordered the prothonotary to tax costs on both sides, and that plaintiff's costs of the trial be deducted out of defendant's costs, if defendant's costs exceed plaintiff's; if plaintiff's costs exceed defendant's, defendant to pay plaintiff's exceedings." The question for us now to determine is, whether one or the other of these cases is right. In *Cooke v. Sayer* the decision is right, if we look only at the Statute of *Gloucester*. But the Court, though referring to the fourth section of the Statute of *Anne*, (4 & 5 *Anne*, c. 16,) which regulates double pleading, does not seem to have adverted to the fifth section, which relates to costs, and is in these words:—"Provided, that if any such matter shall upon a demurrer joined be judged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the said issue shall certify that the defendant, tenant, or plaintiff in replevin, had a probable cause to plead such matters which upon the said issue shall be found against him." Several cases have been decided as to what is "an issue" upon double pleadings founded on the Statute of *Anne*, and where the party would be entitled to costs on such pleadings. *Jones v. Davies and Wife* (b) is one of those cases. There "the defendants had pleaded in assault and battery, first, accord and satisfaction with the husband; secondly, that what the wife did was in aid of the husband; thirdly, not guilty; and, fourthly, *son assault demesne*. On trial the verdict was on the two first-mentioned pleas for the defendant, residue for the plaintiff, without any damages. No certificate from the judge that defendant had probable cause to plead the two last-mentioned pleas. The Court thought that it had no discretionary power, but was bound by the 4 *Anne*, as the judge had not certified. The rule was therefore made absolute, that the plaintiff should have the costs occasioned by the two latter pleas, and that the same be deducted out of the costs allowed the defendants." In a case in trespass in *Buller's Nisi Prius* (c), the defendant pleaded not guilty, and several justifications; upon the trial, the plaintiff not proving his possession in the *locus in quo*, the defendant had a verdict, and by direction of *Denison, J.* the verdict was entered upon the general issue only, upon which there was a motion for a *renire de novo*. But the Court refused the motion, saying, that the verdict was complete and determined the cause, that the plaintiff was not entitled to damages, though they said that the plaintiff might have insisted to have a verdict entered on the other issues

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(a) Barnes, 141.

(b) Barnes, 140.

(c) *Bartlet v. Spooner*, Bull. N. P. 6th edit. 335.

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for the sake of costs, which he would be entitled to unless the judge certified that the defendant had probable cause to plead such a plea. The same case is to be found in *Barnes* (a), and a similar rule is stated by Mr. Justice Buller to have been laid down in *Dayrel v. Briggs* in this Court in *Trinity* term, 25 Geo. 2. The cases of *Duberley v. Page* (b), *Bennett v. Coster* (c), and *Hart v. Cutbush* (d), all shew, that in the construction of the Statute of *Anne*, the practice is to give the plaintiff costs of any issues on which he succeeds, whether of fact or law, though on some other issue the defendant may have judgment as on the whole record. The cases of *Howard v. Cheshire* (e), and *Richmond v. Johnson* (f), have been referred to as shewing what would be the consequence in a case like the present, of a certificate granted by the judge under the Statute of *Eliz.* But it is not necessary for us now to enter on the discussion of that point, as one of the special pleas has been determined in favour of the defendant; and *Butcher v. Green* (g), and *Dodd v. Joddrell* (h), shew that in such a case a defendant is entitled to the costs of the issues found for him, unless the judge should certify. *Vivian v. Blake* (i), supposed to be an authority contrary to those already mentioned, was an action of trespass for breaking and entering the plaintiff's free fishery. The defendant pleaded, first, not guilty; and, secondly, that the said free fishery was part of a navigable harbour, common to all the king's subjects. The replication prescribed for a free fishery, and issue was taken thereon. On a verdict for the plaintiff on the general issue, and for the defendant on the prescription, it was held, that the latter going to the whole declaration, the plaintiff was not entitled to costs. That case is correct if it is meant that the plaintiff was not entitled to the whole costs of the cause, and we do not understand but that that was the question; but if it is meant that he was not entitled to the costs of the finding for him, we think that he was entitled to them. If the plaintiff is entitled to costs on the issues found for him, then comes the question, what is the meaning of the costs of issues? *Brooke v. Willet* (k), and *Vollum v. Simpson* (l), may be referred to as shewing that with respect to this matter the same rule has been applied to a defendant in replevin as elsewhere to an ordinary plaintiff. We notice these cases because they are both cases of replevin, and because, in *Othir v. Calvert* (m), a distinction was taken between actions of replevin and actions of another sort (n). In that case the question, what are the costs of issues, came directly under discussion, when the prothonotaries of the Court of *Common Pleas* differed upon the subject, and Mr. Justice Park said, that "the costs of the issues included only the costs of the pleadings on those issues," and he referred to *Bennett v. Coster* and *Vivian v. Blake*, as supporting that view of the case. Yet it had in substance been differently stated by Mr. Justice Buller in *Duberley v. Page*. But in *Hart v. Cutbush* (o) it was again considered, and *Othir v. Calvert* was there cited and overruled. One of the questions in that case was, whether the plaintiff, who had succeeded on some of the special pleas,

(a) *Barnes*, 461.

(b) 2 Term Rep. 391.

(c) 1 Brod. & Bing. 465.

(d) 2 Dowl. P. C. 456.

(e) *Sayer*, 260.

(f) 7 East, 583.

(g) Doug. 677.

(h) 2 Term Rep. 235.

(i) 11 East, 263.

(k) 2 H. Bl. 435.

(l) 2 Bos. & Pul. 368.

(m) 8 B. Moore, 239; 1 Bing. 275.

(n) See *Cook v. Green*, 5 Taunt. 594, where the defendant in replevin was held entitled to deduct the costs both of the pleadings and trial of those issues which were found for him.

(o) 2 Dowl. Prac. Cas. 456.

though he failed on the general issue, was entitled to the costs of the pleadings alone, or of the pleadings and witnesses on the issues on which he succeeded; and there Mr. Justice *J. Parke*, referring to a case of the *Duke of Newcastle v. Green*, where the defendant put thirty-five special pleas on the record, said "if the plaintiff is entitled to the costs of the pleadings, why should he not be entitled to the costs of the witnesses in support of them." This point was also in some manner before this Court in *Spencer v. Hamerton (a)*, and we now, as then, entirely concur in the view which Mr. Justice *Parke* took of this matter; and we think, that a party entitled to the costs of the pleadings on any issue found for him is entitled to all other expenses incident to those pleadings and occasioned by them; and in *Yates v. Gun (b)*, we find that that was assumed to be the rule, for there the plaintiff was allowed the costs of the trial. Then another objection raised in this case is, that the plaintiff ought not to have taken the issue down to trial till after the demurrer had been decided. But a party has a right to take his issue down to trial as soon as possible; it is expressly so held by Mr. Justice *Buller*, upon an objection, the opposite of this, taken in *Duberley v. Page (c)*. That objection, therefore, is at an end, though, if in itself available, it would be put an end to in the present case, for Mr. Justice *Patteson* was applied to, and refused any order to stay the trial till the demurrer had been argued. On the whole, therefore, we are of opinion that the rule for reviewing the taxation must be discharged.

(a) 1 Har. & Wol. 700.

(b) Barnes, 141.

(c) 2 Term Rep. 391.

PEACOCK, Assignee of J. JONES, v. HARRIS.

ASSUMPSIT for work and labour done and materials supplied by the insolvent. *Plea*: first, *non assumpsit*; secondly, that as to 28*l.* 7*s.* 6*d.* parcel, &c., the insolvent, before the time of petitioning for his discharge under the Insolvent Act, was indebted to a person named *Worley*, and had agreed to assign over to him his effects, &c.; and that the defendant, at the time of the making of the indenture of assignment, was indebted to the insolvent in the sum of 28*l.* 7*s.* 6*d.* and no more; and that one of the debts so assigned to *Worley* was the debt owing from the defendant to *Jones*, and that the defendant paid to *Worley* a certain sum of money, to wit, &c. in discharge of the same, which *Worley* received in full satisfaction and discharge thereof. *Replication*, that the deed was made by the insolvent with the intention of petitioning the Court for the Relief of Insolvent Debtors for his discharge. *Rejoinder*, taking issue thereon. The cause was tried before Mr. Baron *Bolland*, at the spring assizes for *Denbigh*, in 1835, when it appeared that the deed referred to in the pleadings was made by *John Jones*, on the 1st of *January*, 1833, and at the trial it was proposed to give in evidence certain declarations of the bankrupt made in the month of *April*, and explaining his intentions in making the deed. The learned judge received the evidence, and a verdict was found for the plaintiff, damages 30*l.* A rule for a new trial had since been obtained, on the ground that this evidence had been improperly admitted.

John Jervis, shewed cause.—The statements of the insolvent here were

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The declarations of an insolvent made at the time of filing his schedule to obtain his discharge under the Act for the Relief of Insolvent Debtors, are not receivable in evidence, in order to show that a deed of assignment, executed by him some time previously, was so executed with the view or intention of petitioning for his discharge.

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properly admitted in evidence, with a view to shew that the deed was made by him with the intention of petitioning for his discharge. If so, the deed was void under the 7 G. 4, c. 57, s. 32. This case must be governed by that of *Ridley v. Gyde* (a). In that case a trader being pressed for payment of a debt by the attorney of a creditor, promised to give a security on the following day, instead of which he left his place of residence, and immediately afterwards gave securities to another creditor, a relative, and it was held that the declarations of the debtor, in a conversation held a month afterwards with the attorney of the former creditor, were admissible in evidence to support an alleged act of bankruptcy, by way of fraudulent preference, and to shew the conduct of the party giving these securities, although it was objected that the conversation took place in the absence of the person giving them, and at too great a distance of time from the completion of the transaction. Evidence was given in this case to shew that the insolvent had been guilty of fraud. That made all that he said admissible against the parties whom he had constituted his trustees. There was a case in the *Exchequer* where there was an issue taken under the Interpleader Act (b), on the question in whom certain goods were vested. They had been originally vested in A., and his declarations were held to be evidence against those who claimed from him, conspiracy and fraud on his part having been shewn. Then as to the time at which these declarations were made in the present case. In *Ridley v. Gyde*, declarations made more than one month after the time were admitted. There are other cases on the same subject. The first is *Vacher v. Cocks* (c), where the declarations of the bankrupt made at the time of the transaction, though unconnected with it, were held to be admissible; and the second, *Herbert v. Wilcox* (d), where a declaration of an insolvent, made at the time of paying some money to a particular creditor, were received to shew the circumstances he was in when he made the payment. These cases, and another, *Newman v. Stretch* (e), where the declarations of a bankrupt on his return, that he had absented himself to avoid a writ against him, was held sufficient evidence of the act of bankruptcy, all shew that when a bankruptcy is set up, declarations of the bankrupt, though made after the time of the act of bankruptcy, are admissible in evidence to explain it.

*R. V. Richards.*—The declarations of the insolvent are not admissible in evidence in this case. The schedule is the only declaration made by him in order to entitle himself to his discharge, and is the only evidence of his intention. *Ridley v. Gyde*, requires again to be considered, for it is opposed to the clear rule of law, that declarations are only receivable in connection with an equivocal act which they are required to explain; and besides this, it was not an unanimous decision of the Court. In *Newman v. Stretch*, the declarations admitted in evidence were part of the transaction itself, and the statement of the bankrupt was also necessary for the purpose of explaining what was otherwise a doubtful act. In the present case the deed is dated 1st of January, 1833. The declarations were made long afterwards. Suppose that no bankruptcy had intervened, the title of the defendant was mature by the deed. The deed required no explanation. The imprisonment, when these

(a) 2 Moore &amp; Scott, 448; 9 Bing. 349.

(b) The name of the case was not mentioned.

(c) Moo. &amp; Malk. 353; 1 Barn. &amp; Ad. 145.

(d) 3 Moore &amp; Pay. 515; 6 Bing. 203.

(e) Moo. &amp; Malk. 338.

declarations were made, took place in *April*, and four months afterwards this Court is called on to admit declarations of the insolvent as to his motives at a time so long gone by. There is no allegation of fraud in the plea; there should have been such an allegation if that question was intended to be raised.

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v.  
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Lord DENMAN, C. J.—After the decision which has taken place in the Court of *Common Pleas*, we must look into the question.

*Cur. adv. vult.*

Lord DENMAN, C. J.—The question in this case was, whether the schedule of an insolvent debtor was to be taken as sufficiently explanatory of his intention in making, some time before, a deed of assignment of part of his property, or whether declarations made after the execution of the deed could be admitted in evidence to explain that intention. According to the case of *Ridley v. Gyde*, these declarations would be admissible, but that case is distinguishable from the present, for there the declarations were in explanation of former discussions between the parties on the same subject, here they are made, accompanying an act done under a statute *alio intuitu*. But if this case did resemble *Ridley v. Gyde*, so as to make one an authority for deciding the other, we should be bound to say, that we do not agree with that case. All declarations contemporaneous with the act are receivable, but the act having been once done, no subsequent declarations can be received in evidence. The schedule was receivable, not the declarations. There must, therefore, be a new trial.

Rule absolute.

### CLAY v. BOWLER.

THIS was an application on the part of the defendant to be discharged from custody in this suit, under the 48 *Geo. 3*, c. 123, he having been in custody more than twelve months in execution for a debt of less than 20*l*. The affidavits stated that the defendant had been charged in execution in the month of *November*, 1836, on a debt for 14*l*., the costs amounting to 28*l*.: that the defendant had real property to the amount of 35*l*. a-year, and that he had been in gaol from the time of his first imprisonment to the present moment. In 1835 he had been brought up under the compulsory clause of the Lords' Act, but refused to give any account of his property, declaring that the plaintiff should never get a shilling. Since then he had become lunatic, and the present application was made on his behalf by his next friend.

A prisoner who has been in custody in execution for more than twelve months for a debt less than 20*l*., being entitled as of right to his discharge under the 48 *G. 3*, c. 123, though he has previously, when brought up under the compulsory clause of the Lords' Act, refused to deliver in a schedule, the application for the discharge may, if the prisoner himself is a lunatic, be made by his next friend, though no commission of lunacy has issued, nor any committee been appointed.

*Whitehurst* shewed cause against the rule.—The prisoner here has not complied with the provisions of the statute 48 *Geo. 3*, c. 123, under which this application is made. That statute declares, that prisoners confined for debts less than 20*l*. “shall and may, upon his, her, or their application for that purpose, in term time &c., be forthwith discharged.” Here the application is not made by the party, but by his next friend, he himself, since he was brought up under the compulsory clause in the Lords' Act and refused



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to assign over his property, having become lunatic. This is not sufficient: the statute does not mention that any one may apply for him. The Court will not favour this application, for if the defendant is now discharged on this application, the plaintiff will have no remedy whatever, for no assignment can now be made of his property. The provisions of a subsequent statute, 7 Geo. 4, c. 57, s. 73, expressly directed to the cases of lunatic prisoners, imposes on them, as a condition of their discharge, the vesting of their property in the hands of the assignees. The object of that condition will be defeated if this application is successful.

*V. Williams*, in support of the rule.—The question of a prisoner's right to his discharge under the 48 Geo. 3, c. 123, has already been expressly decided in *Stacey v. Fieldsend (a)*, and *Ex parte White (b)*, where it was held, that a prisoner in custody for debt or damages not exceeding 20*l.*, was, under that statute, entitled to his discharge as a matter of right, though he had previously refused, when brought up under the compulsory clause of the Lords' Act, to deliver in a schedule. The same point has also been decided in *Lundon v. Rossiter (c)*, and *Wood v. Kelmerdine (d)*. The abstract point, therefore, which is now to be considered, is, whether a lunatic may, by his next friend, take advantage of the statute. It is true that the statute does not expressly mention that any one may apply for him, but this case comes within the spirit of the act, and the court will not on a mere matter of form put a debtor of sound mind, who refuses to deliver up his property, in a better situation than one of unsound mind who has made the same refusal. The law allows guardians to infants, and on the same principle will recognise the act of a next friend for a lunatic, and will treat this as the application of the lunatic himself.

LORD DENMAN, C. J.—The question here is, whether this is an application of the prisoner within the terms of the statute. He himself is a lunatic, and the application is in fact made by his next friend. In an ordinary case that would not be sufficient, but in the case of a lunatic it is so. It would be a violent thing to say, that under such circumstances a mere form shall deprive a man of the benefit intended to be given him by a statute.

LITLEDALE, J.—The party himself is not in a state to make an application. Perhaps, in strictness, this application could not be made till a commission of lunacy had issued, and a committee had been appointed; but we must consider the object of the statute, which was, that no man should be kept in prison more than twelve months for a debt of less than 20*l.* We cannot defeat that object by a difficulty of the sort raised in the present case.

PATTESON, J. and WILLIAMS, J. concurred.

Rule absolute.

(a) 1 Dowl. Prac. Cas. 700.

(b) *Id.* 66.

(c) M'Clel. 6; 13 Price, 186.

(d) 2 Y. & J. 10.

DOE *d.* HURST *v.* CLIFTON and others.DOE *d.* ORCHARD *v.* STUBBS.

IN *Easter* term a rule was obtained, calling on the lessors of the plaintiff to shew cause why it should not be referred to the Master to ascertain what was due for principal and interest on a certain mortgage deed, dated the 12th day of *February*, 1834, on which the verdicts in these causes respectively were obtained, and why the Master should not have power to call for such deeds, papers, and vouchers, and examine such persons *virâ voce* as he should see fit, and also to tax the lessors of the plaintiff their costs; and why *James Orchard*, in the affidavit in the said rule named, or his assignee, should not accept the amount of such principal, interest, and costs, in discharge of the said mortgage, and execute a re-conveyance of the mortgaged premises, and deliver up all deeds relating thereto to *Thomas Neatby Stubbs*, in the said affidavit also named, or to whom he might appoint; or why, in case of refusal, by the said *James Orchard*, or his said assignee, so to do, the said money should not be paid into Court to abide the further order of the Court, and that in the meantime proceedings be stayed, and that the *postcas* in these causes be retained by the associate. The affidavits filed by Mr. *R. Stubbs*, by whom the application was made, stated, among other things, that these causes were tried at the last assizes for the county of *Hertford*, and that the verdict was for the plaintiff in *Orchard's* ejectment; that the title of the said *James Orchard* was founded solely on a mortgage deed, purporting to bear date on or about the 12th day of *April*, 1824, whereby Mr. *Thomas N. Stubbs*, therein described as resident in this country, but who for several years last past has resided at *Fort St. George* in the *East Indies*, and who was then entitled under the will of *Thomas Neatby*, Esq. deceased, to the premises in question, in reversion, expectant on the decease of the survivor of two tenants for life therein named, conveyed his reversionary estate and interest in the said premises, and also in certain other property, unto the said *James Orchard*, then an attorney of this Court, to hold to him the said *James Orchard*, his executors, administrators, and assigns, but by way of mortgage, nevertheless, and subject to redemption on payment by the said *Thomas N. Stubbs* to him or them of the sum of 200*l.* with lawful interest, and which sum was composed partly of money advanced by *Orchard*, but principally of law costs and charges which he had against the said *T. N. Stubbs*, as his attorney and solicitor, and that both the said tenants for life are dead: that the deponent is advised and believes that the said *T. N. Stubbs* is the proper party, and has just right to redeem the said mortgage, and that deponent is duly authorized to act for him in this behalf: that no suit in equity, to the knowledge and belief of deponent, is pending to foreclose or redeem the said mortgage, or any part thereof: that judgment has not been signed in either of these causes: that although the said *Thomas N. Stubbs* did not defend these actions as landlord, the plaintiff alleged at the said trials, that the same were in effect defended for him and to protect his interest, and that he had identified himself therewith; and the said judge who tried the said causes held, upon the evidence adduced, that the defendants were to be treated as tenants of the said *Thomas N. Stubbs*, and upon that ground precluded them from setting up a prior mortgage of the premises executed by him, in consequence of which a verdict passed for the

A party applying for the assistance of the Court under the 7 G. 2, c. 20, to compel a mortgagee to re-convey the mortgaged premises, must be the very party entitled to redeem, and also the defendant in the ejectment, if such an action has been commenced. An authorised agent is not within the provisions of the statute.

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plaintiff on the said *James Orchard's* demise, which verdict this Honorable Court has refused to disturb. A supplemental affidavit, filed since the rule had been obtained, stated that a suit for foreclosure was now instituted.

*Kelly and Petersdorff* shewed cause against the rule.—This is an application founded entirely on the 7 G. 2, c. 20 (a), which must therefore be strictly complied with. It has not been complied with in the present case. The applicant is not the party entitled to redeem, nor is he the defendant in the action, nor is liable to costs. He is not therefore in a situation in which to call for the assistance of the Court. This is not a matter for the discretion of the Court, but is to be decided by the terms of a statute which must be strictly pursued, for the powers thereby given to the Court are very extensive. They enable the Court not only to set aside proceedings in an action, but to call for all papers and documents and to compel their delivery over from one party to another and the reconveyance of the estate itself. The plaintiffs here have given notice to the other side that the right to redeem, and that the amount of the sum due, are both disputed. This Court, therefore, will not interfere under such circumstances. *Goodtitle d. Taysum v. Pope* (b) and *Goodtitle d. Fisher v. Bishop* (c).

*Platt*, in support of the rule.—The case of *Goodtitle d. Taysum v. Pope* is not in point. The party there precluded himself from making the application, by having agreed to convey his equity of redemption to the mortgagee. There has been no such agreement in the present case. On the contrary, the right to redeem is expressly reserved. The other case is also inapplicable, for *Orchard* here has no right to dispute the title of the party to redeem. If the mere assertion that the right to redeem is disputed, is to furnish an answer to an application like the present, the provisions of the statute will be utterly useless, for any party who wishes to retain the estate will deny the existence of the right to redeem, and thus prevent the operation of the statute. As to the other objection, that the applicant here is not himself the party entitled nor the defendant, he is the agent of the party entitled, and has been in substance the defendant. He is ready too to comply with the provisions of the statute, and to bring into Court the principal money, interest, and costs. The whole object of the statute will be defeated

(a) By which it is enacted, that "If the person or persons having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant or defendants in such action, shall at any time pending such action pay unto such mortgagee, or in case of his refusal, shall bring into Court where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage, (such money for principal, interest, and costs to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose,) the monies so paid to such mortgagee or brought into such Court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgage or defendant of and from the same ac-

cordingly."

And by section 3 it is provided, "That this act or any thing herein contained shall not extend to any case where the person or persons against whom the redemption is or shall be prayed, shall by writing under his, her, or their hands, or the hands of his, her, or their attorney, agent, or solicitor, (to be delivered before the money shall be brought into such Court of Law to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage or shall be admitted on the other side, nor to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted."

(b) 7 Term Rep. 185.

(c) 1 Yo. & Jerv. 344.

if this objection prevail. The whole proceedings are in this Court; this Court therefore may properly make an order of this sort with respect to them.

LORD DENMAN, C. J.—This is a case in which we may wish to have power to grant the application, but we cannot give that power to ourselves, if the statute has not conferred it upon us. The applicant here is not within the terms of the statute, for he does not answer the most essential part of the description there given of the party who is to make an application of this sort, he is not a defendant in the proceeding in question, and there is an obvious reason why he should be so in order to give him this advantage. We cannot abuse the power we really possess by attempting to do what we are required, when we have no legal authority to do it; we must act solely on the authority which the law has given us, and not, merely because the judgment has been given in our Court, suspend the rights of the parties who are entitled to it.

LITLEDALE, J.—It appears reasonable that the party now applying should be relieved in the manner prayed for on the payment of principal, interest, and costs, but the question is, whether we have power to do what he requires. This Court interfered a good deal in the course of the last century in cases of this sort, by sending such inquiries as these before the Master. But the mode of proceeding in these cases is stated in the statute, and must be strictly followed. We might refer it to the Master to state what is due on the mortgage bond, but if the party applying does not bring himself within the provisions of the statute, we have not power to assist him. He must be the defendant in the action, and then he would be liable to all the consequences of being so. There are particular provisions in the statute respecting landlord and tenant, and the party must therefore pursue the particular mode of proceeding there pointed out. He is required by the statute to be a defendant, he is not so here, and I confine myself to that as the ground of refusing his application.

PATTESON, J.—We cannot get rid of the words “who shall appear and defend in the action.” These words cannot be disregarded.

WILLIAMS, J. concurred.

Rule discharged.

### GAMBRELL v. Lord FALMOUTH and others.

**I**N this case a question was raised as to what costs one of several defendants should have upon his succeeding in the suit. The Master had only allowed him his separate costs. A rule was obtained to review the taxation.

*Per Curiam*.—We think that we are bound by the case of *Griffiths v. Kynaston* (a), which was considered and recognized in *Griffiths v. Jones* (b). Those cases lay down this rule, that one of several defendants, if successful, is to be allowed all his separate costs, and his portion of the joint costs, unless the Master is satisfied that he has been indemnified.

Rule absolute.

(a) 2 Tyr. 757. (b) 1 Gale, 254; 4 Dowl. Prac. Cas. 159; 2 Crom. M. & R. 333.

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Where one of several defendants succeeds in a suit, he is to be allowed not only his separate costs, but his portion of the joint costs, unless the master is satisfied that he has been indemnified. (See the next case.)

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## CAIN v. ADAMS and STANTON.

And where the defendant has been entitled to certain costs, and these have been deducted from the plaintiff's costs, and an *allocatur* given for the balance, if any money has been previously paid by the plaintiff to his attorney, such money must be deducted from the amount of the *allocatur*, and the lien of the attorney will be limited to the final balance.

**A**CTION on the case for an excessive and illegal distress. The declaration contained four counts. *Adams*, the landlord, pleaded the general issue as to the third count, and paid 40*s.* into Court in satisfaction of the damages on the residue. *Stanton*, the broker, pleaded the general issue to the third and fourth counts, and paid 40*s.* into Court on the first and second counts of the declaration. The cause was referred, and the arbitrator directed that a verdict should be entered for the plaintiff against *Adams* on the first, second, and fourth counts in the declaration, with 3*l.* damages for *Adams* on the general issue to the third count, and for *Stanton* on all the issues. On the taxation of costs, the Master allowed the plaintiff the general costs of the cause, which he taxed at 81*l.*, making with the damages 84*l.*; he allowed *Stanton* only such costs of the defence as had been incurred exclusively on his account, and these he taxed at 13*l.* 10*s.*, and he allowed *Adams* costs upon the issue found for him, and taxed them at 20*l.* 15*s.* These two sums amounted together to 34*l.* 5*s.*, which the Master deducted from the 84*l.*, and then indorsed the balance, 49*l.* 15*s.*, upon the record, and gave his final *allocatur* for that sum. It appeared that *Adams* had been plaintiff in the *Exchequer* in an action against *Cain*, where he obtained a verdict with 36*l.* damages, which, added to his costs in that action, amounted together to 63*l.* 11*s.*, and an order of a judge directed that the damages and costs in the action in the *Exchequer* should be set off against the damages and costs in the action in this Court, subject to the attorney's lien for the costs in this action. When this rule had been made, the Master called upon the plaintiff's attorney to shew what costs he had received on the plaintiff's account. It was admitted that a sum of 19*l.* had been advanced to him by the plaintiff in the course of the cause. The defendants contended that this 19*l.* was to be deducted from the 49*l.* 15*s.*, leaving the lien of the plaintiff's attorney upon the sum of only 30*l.* 15*s.* The Master, however, thought that unless the payments by the plaintiff to his attorney reduced the amount to less than that stated in the *allocatur*, the attorney must be considered to have a lien on the costs for that amount. A rule had been obtained for the Master to review his taxation of *Stanton's* costs; to allow him one-half of the costs incurred in the joint defence, and to deduct the sum of 19*l.* from the *allocatur* in this cause.

Sir *W. Follett* shewed cause, and *Platt* was heard in support of the rule.

*Per Curiam*.—The rule is, that where there has been a joint defence, and one of the defendants succeeds, he shall have all his separate costs and an aliquot part of the joint costs, unless the Master sees some special reason why that should not be the case. We adopted that rule yesterday in *Gambrell v. Lord Falmouth*. As to the other point, it is clear that the attorney is only entitled to a lien on the balance. The 19*l.* must be deducted.

Rule absolute.

\* \* The Editors have to inform the profession, that, from circumstances connected with the publication of these reports, they are in-

debted to Mr. *Charles Clark* for the reports of the decisions in the full Court of *King's Bench*, during Trinity term.

# CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term, 1836.

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## REGULA GENERALIS.

**IT IS ORDERED**, That, from and after the last day of this Term, all rules upon sheriffs, other than the Sheriffs of *London* and *Middlesex*, to return writs either of mesne or final process, and rules to bring in the bodies of defendants, be eight-day rules instead of six-day rules.

REGULA  
GENERALIS.

(Signed by the Fifteen Judges.)

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## HAYWOOD'S Bail.

Bail Court.

**LUMLEY**, on the 19th of *November*, opposed these bail, and objected that there had been an alteration in the bail-piece in the name of one of the bail, and that no explanation was given of it except the initials of the commissioner before whom the bail was taken being in the margin adjoining the alteration. The name of the bail was originally written "*Hayword*," but had been altered to "*Haywood*." In the affidavit of the caption of the bail the name was *Haywood*. It was submitted, that the alteration might have been made since the bail-piece was taken.

It is no objection to bail justifying that an alteration in the name of one of them appears to have been made in the bail-piece, the initials of the commissioners who took the bail being in the margin.

*Cowling, contra.*

**LITTLEDALE, J.**—I do not think that there was any necessity to give any explanation of the alteration. The initials of the commissioner are in the margin, and in the affidavit of caption the name is *Haywood*, and the alteration cannot therefore have been subsequently made.

The bail were then allowed.

## Bail Court.



## PIERCE'S Bail.

Where a defendant is a prisoner, a two days' notice of putting in and justifying bail at the same time, need not state that the defendant is a prisoner.

**BUSBY** opposed these bail.—The notice of the bail justifying at the same time they were put in, was given on the 15th of *November* for the 17th, which is contrary to the rule of *T. T. 1 W. 4 (a)*, requiring four days' notice. It will be contended on the other side, that the defendant is a prisoner, which takes the case out of that rule, but that fact does not appear on the face of the notice, or of any of the proceedings, and the Court cannot take judicial notice of it. The case of *Crighton's bail (b)* shows that that ought so to appear.

*J. Jervis, contra*.—In this case the defendant is a prisoner, and it has been decided that the rule of *T. T. 1 W. 4*, does not apply to prisoners (*c*). It cannot be necessary that it should appear on the proceedings that the defendant is a prisoner, as that is a fact known to the plaintiff. The case cited was a decision of a single baron in the Court of *Exchequer*, and is not binding on this Court.

**LITLEDALE, J.**—It appears to me that this notice is sufficient, and for this reason: by the old practice it would have been a good notice, then came the new rule of *T. T. 1 W. 4*, requiring four days' notice, but that rule has been held not to be applicable to prisoners. The practice, therefore, is untouched as to them. The plaintiff knows that the defendant is a prisoner, and cannot therefore be misled. The case referred to deciding the other way was not decided before the full Court, and it seems to me that I shall decide according to the justice of the case by holding this notice to be good.

The bail were then examined and allowed.

(a) 1 Dowl. P. C. 102.

(b) 1 Crompt. & Mees. 335; 1 Dowl. P. C. 609.

(c) *Davies v. Grey*, 2 Crompt. & Jerv. 309, 2 Tyr. 277; *King's bail*, 1 Dowl. P. C. 509.

## HOLLING'S Bail.

Notice of bail given under the 2d rule of *T. T. 1 W. 4*, must not only state the residence of the bail for the last six months, but also aver such was the residence during that time.

**J. JERVIS** asked leave to justify bail, notwithstanding a defect in the notice, which did not exactly comply with the 2d rule of *T. T. 1 W. 4 (d)*. The notice stated the bail to be a housekeeper, and that he resided in a certain place mentioned, but did not go on to say that he had been resident at that place for the last six months. He submitted that it must be assumed he had resided there that time, and cited *Fenton v. Warre (e)* and an *Anonymous* case (*f*).

**LITLEDALE, J.**—I cannot assent to those decisions. Time, however, may be granted to amend.

Rule accordingly.

(d) 1 Dowl. P. C. 103.

(e) 1 Dowl. P. C. 295.

(f) 1 Dowl. P. C. 160.

Bail Court.

## BROWN'S Bail.

**M**ANSEL opposed these bail, and objected to the affidavit of justification given under the 3d rule of *T. T. 1 W. 4 (a)*, that it did not comply with the rule of *H. T. 2 W. 4. I. 5 (b)*, there being no addition or residence of the deponents mentioned. He submitted that that rule extended to affidavits of justification of bail as well as to other affidavits.

The affidavit of justification of bail, given under the rule of *T. T. 1 W. 4*, must have the addition and residence of the deponent, as required by the rule of *H. T. 2 W. 4*.

*Fitzherbert, contra.*

LITTLEDALE, J., thought the affidavit incorrect, but that it would only have the effect of depriving the defendant of the costs of justification (c).

The bail were then examined and allowed.

(a) 1 Dowl. P. C. 103.  
(b) 1 Dowl. P. C. 184.

(c) See *Carter's bail*, 1 Will. Wol. & Dav. 187;  
*Cripp's bail*, Id. T. T. 1837; and the next case.

## ROUT'S Bail.

**T**HESE bail were examined and allowed.

*Wilson* then asked for the costs of opposition, as the affidavit of justification did not conform to the 3d rule of *T. T. 1 W. 4 (d)*, it being stated that the bail's property consisted of stock-in-trade, good book debts, and household furniture of such a value, but did not state the value of each part of that property, as required by the rule.

Where the affidavit of justification of bail did not comply with the rule of *H. T. 1 W. 4*, from not stating the value of the different descriptions of the bail's property, and the bail were allowed:—*Held*, that the plaintiff was not entitled to the costs of opposition.

*Manse*, *contra*, contended, that as the affidavit did not conform to the rule, the defendant was not intitled to be paid the costs of justification, but that that was no ground why he should pay to the plaintiff the costs of opposition.

LITTLEDALE, J., said that the plaintiff was not intitled to the costs of opposition (c).

(d) 1 Dowl. P. C. 103. 187, and *Cripp's bail*, Id. T. T. 1837, and  
(e) See *Carter's bail*, 1 Will. Wol. & Dav. the case above.

## DOE d. HODGSON v. SUMMERFIELD and others.

**G.** T. WHITE moved for an attachment against the defendants for not paying costs pursuant to an award. There were three defendants, and the award was, that each should pay one third of the costs. The only question was, whether it was necessary to have three separate rules or a joint one.

Where an award directs that three defendants should each pay one third of certain costs, it is necessary to have separate rules for attachments for non-payment.

COLERIDGE, J.—You must have separate rules.

Rules granted accordingly.



Bail Court.



## Ex parte STRONG.

*Habeas corpus* to take a party, in custody under a writ *de contumace capiando*, before an Ecclesiastical Court to purge a contempt, refused by this Court to the party himself.

**SEWELL** applied on the part of *Strong* for a *habeas corpus*, directed to the keeper of *Ilchester* gaol, to take him into the Ecclesiastical Court at *Wells*, for the purpose of purging a contempt.—A suit having been commenced against *Strong* in that Court, he was taken into custody for contempt, and lodged in *Ilchester* gaol. By the stat. 53 *Geo.* 3, c. 127, for the better regulation of the Ecclesiastical Courts, it is enacted, that the proceedings on the writ *de contumace capiando* thereby given, shall be according to the provisions of the stat. 5 *Eliz.* c. 23. By that statute the writ is made issuable out of *Chancery*, and returnable into the *King's Bench*. This Court therefore has jurisdiction in this case.—[*Littledale, J.*—Has the sheriff returned the writ into this Court?—No, he has not, but as the writ is returnable here, that is sufficient to give this Court jurisdiction.—[*Littledale, J.*—Is there any authority for such an application?—No, there is not, yet it is but reasonable it should be granted, especially as made by the party himself, who has no other method of purging his contempt.

**LITLEDALE, J.**—I cannot see that this Court has authority to do what is now required, and no precedent has been cited of any similar application. If I grant the rule it will become a precedent, the application must therefore be made to the full Court.

Rule refused.

*Sewell* afterwards applied to the Court of *Chancery*, and the Lord Chancellor granted the application.

## JOHNSON v. FRY.

Judgment entered up on an old warrant of attorney, on an affidavit that the defendant had been seen alive eight months previously in *New South Wales*.

**MANSEL** moved, on the 5th of *November*, to enter up judgment on an old warrant of attorney. The affidavit stated, that the defendant had been seen alive by the deponent at the end of *February*, at *Sidney*, in *New South Wales*, and that the deponent arrived in this country in *September*. He cited the case of *Fursey v. Pilkington* (a). The voyage to *Sidney* is ordinarily performed in about five months.

*Cur. adv. vult.*

**LITLEDALE, J.**, afterwards (*November* 11th) granted the rule.

Rule granted.

(a) 2 Dowl. P. C. 452 ; see also *Hopley v. Thornton*, 2 Dowl. & Ry. 12.

## MILSTEAD v. NURSEY.

**C. TURNER** shewed cause against a rule for judgment as in case of non-suit, and contended, that as the action was for a small sum, only 2*l.* 17*s.*, he was not bound to give a peremptory undertaking, but that the Court would discharge the rule, if the defendant did not consent to a *stet processus*. He understood that the Court of *Exchequer* had so decided a few days previously.

The Court will not discharge a rule for judgment as in case of non-suit, when the sum sought to be recovered is small, because the defendant will not consent to a *stet processus*.

*Henderson, contra*, refused to consent to a *stet processus*, and contended that the Court had not power to discharge the rule.

*Cur. adv. vult.*

LITTLEDALE, J., afterwards (November 16th).—I have seen the barons of the *Exchequer*, and they say that they have made no decision to discharge a rule for judgment as in case of nonsuit, where the sum sought to be recovered is small, if the defendant will not consent to a *stet processus*.

Rule discharged on a peremptory undertaking.

## The KING v. HANCOCK and others

**ERLE** moved, on the part of the prosecutor, for a *certiorari* to remove an indictment for keeping a gaming house, from the *Clerkenwell Sessions* (a). There had been a similar indictment against the same defendant, in which he was acquitted on account of the description of the house not being sufficiently accurate. Application had since been made to the sessions to quash that indictment, which application had been refused. It was expected that, on the trial of the present indictment, several questions would arise as to the acquittal on the former indictment; which he submitted was sufficient reason for the Court to grant a *certiorari*.

*Certiorari* to remove an indictment for keeping a gaming-house refused to the prosecutor, where it was suggested that questions would arise on an acquittal on a former indictment, in which the house had been misdescribed.

LITTLEDALE, J. thought it not sufficient ground for removing the indictment.

Rule refused.

(a) See the stat. 5 & 6 W. 4, c. 33.

## The KING v. JONES and another.

**GEORGE** moved, on the part of the prosecutor, for a *certiorari* to remove an indictment which had been found at the sessions in *Shropshire*. The indictment was for an assault on some gamekeepers of a justice of the peace of the county. It was stated that the justice was himself interested in the matter out of which the assault arose, and that the gamekeepers were at the time acting under the authority of the son of the justice. It

*Certiorari* to remove an indictment found at Sessions, on the ground that a magistrate was interested in the matter, granted to a prosecutor.

*Bail Court.*

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THE KING

v.

JONES and
another.

was submitted, that that was sufficient cause to induce the Court to allow the indictment to be removed into this Court (a).

LITTLEDALE, J.—You may take your rule (b).

Rule granted.

(a) See 5 & 6 W. 4, c. 33.

(b) But see *The King v. Fellows*, 1 Har. & Wol. 648.

IN re JOHN WILLIAMS.

A person, who had been an attorney of the Court of *Great Sessions*, and who had been admitted an attorney of the Court of *King's Bench*, under stat. 11 G. 4, and 1 W. 4, c. 70, cannot be called on summarily to answer for misconduct committed when an attorney of the Court of *Great Sessions*.

THIS was a rule calling on an attorney of this Court to shew cause why he should not answer the matters of an affidavit. At the time of the imputed misconduct the attorney was an attorney of the Court of *Great Sessions* in *Wales*, but not of this Court. Since the passing of the act, abolishing the *Welsh* Courts, 11 Geo. 4, and 1 W. 4, c. 70, he had been admitted an attorney of this Court, under the 17th section of that act.

V. Williams, shewed cause.—A preliminary objection to this rule is, that this is an application for the extraordinary jurisdiction of the Court over a person, who, though now an attorney of the Court, yet was not one at the time of the imputed misconduct. By the 11 G. 4, and 1 W. 4, c. 70, no authority is given to this Court to exercise this power.

W. H. Watson, contrà.—The act having abolished the Courts in *Wales*, and allowed the attorneys practising in those Courts to be admitted of the Courts at *Westminster*, it is to be inferred that this Court has now the same jurisdiction over the *Welsh* attorneys that the Court of *Great Sessions* would have had.

LITTLEDALE, J.—I think this Court has not that power. Had the act explicitly enacted, that if the attorneys had been guilty of any misconduct this Court should take notice of, it would be otherwise. The only consequence is, that in this case the extraordinary jurisdiction of the Court cannot be exercised, and the party is left to his ordinary common law remedy. The rule must be discharged with costs, as the applicant ought to have taken care that the party against whom he applied was in fact an attorney of the Court.

Rule discharged, with costs.

Ex parte FRYER.

An attorney who acted for one of the parties to an arbitration, and who gave his undertaking to pay a certain sum for his client in order to save the expense of a formal award, may be called on summarily to perform his undertaking, although no cause was depending in the Court.

THIS was a rule to shew cause why an attorney should not pay the applicant the sum of 19*l.* 14*s.*, pursuant to an undertaking he had given; and why he should not pay the costs of, and incidental to, the application. A person named *Baker* held a farm of *Fryer*, and some disputes arose after

A person named *Baker* held a farm of *Fryer*, and some disputes arose after

Baker had quitted the farm as to the payment of rent, and as to the occupation, which were referred to arbitration, no action having been commenced. The draft of the award was made by the arbitrator ordering *Baker* to pay *Fryer* 19*l.* 14*s.*; and on the last day on which the award could be made, *Baker's* attorney, who had attended on his behalf before the arbitrator, in order to save his client the expense of the award, gave an undertaking to pay that sum. The award accordingly was not drawn up. Several applications were made to *Baker* for payment of the money; and on his neglecting to do so, an action was commenced against him for the rent, and afterwards notice was given to his attorney to pay the money pursuant to his undertaking, which he refused to do. It did not appear whether the submission to arbitration had been made a rule of Court.

Bail Court.

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Ex parte  
FRYER.

*Platt* shewed cause (Nov. 22d.)—This undertaking does not differ from any other common undertaking, and the Court cannot compel this person to perform it merely because he is an attorney of the Court, but will leave the parties to their remedy at common law. There was no action depending in this Court, nor does it appear the submission to arbitration has been made a rule of Court, and there is no authority therefore to shew that it is a case in which the Court will exercise its extraordinary jurisdiction over its officers. Moreover, *Fryer*, by commencing an action against *Baker*, has made his election to sue him, and cannot now ask the attorney to perform his undertaking. The object of this application is to enforce in this method an undertaking which is void by the statute of frauds.

*Barstow, contrd.*—There are many cases to shew that this Court has authority to enforce this undertaking, although it may be void by the statute of frauds. *In re Paterson* (a), *In re Graves* (b), *Iveson v. Conington* (c), and *Sharp v. Hawker* (d), are authorities for that position, as well as to shew that it is not necessary there should be a cause depending in the Court. In this case the attorney acted as attorney for *Baker*, and gave the undertaking in his character of attorney, and for the purpose of saving his own client the expenses of the award. There can be no objection to the Court exercising its jurisdiction, because the applicant has also proceeded by action against *Baker*.

Cur. adv. vult.

LITTLEDALE, J., afterwards (Nov. 25th) gave judgment.—In this case I think, that, although the attorney was not an attorney in any cause, nor was there any cause depending, yet that the case is within the rule laid down in the case of *In re Aitkin* (e). The attorney has given a positive undertaking, and he must therefore pay the sum of 19*l.* 14*s.*; but as the applicant has brought an action for the rent, I do not think that the attorney should pay the costs of this rule. The rule must therefore be absolute, without costs; and on payment of the 19*l.* 14*s.* within a month, the proceedings in the action must be stayed.

Rule absolute accordingly (f).

(a) 1 Dowl. P. C. 488.

(b) 1 Crompt. &amp; Jerr. 374, note.

(c) 1 Barn. &amp; Cress. 160; 2 Dowl. &amp; Ryl. 307.

(d) 2 Hodges, 113; 5 Dowl. P. C. 186.

(e) 4 Barn. &amp; Ald. 47.

(f) See the next case.

Bail Court.

The Court will not summarily compel an attorney to perform an undertaking given by him to indemnify a nominal defendant in an ejectment.

## Ex parte CLIFTON.

**PETERSDORFF** (Nov. 3d) moved for a rule to shew cause why an attorney of this Court should not pay two sums of money, according to his undertaking.—*Clifton*, who was tenant in possession of some premises, was served with the copy of a declaration in ejectment, and, having no interest in the premises, declined to defend the ejectment unless an indemnity was given him. The attorney gave him the indemnity, and defended the action as attorney for the landlord, *Clifton* being made the nominal defendant. The lessor of the plaintiff recovered, and *Clifton* was obliged to pay the costs. In the case of *Ex parte Moron* (a) the summary jurisdiction of the Court was recognised, though the rule was refused. Many other cases may be cited to the same effect. The person who gave this undertaking having been the attorney in the cause, is a reason why the Court should interfere, as he gave the undertaking in his character of attorney.

LITLEDAL, J.—In the case cited the attorney obtained the deed in his character of attorney. This case also differs from *In re Aitkin* (b). Here the attorney is only in the situation of any other person who gives an undertaking, and must be sued by action. I am clearly of opinion it is not a case in which this Court can interfere in a summary way; but application may be made to the other Court if it is desired.

Rule refused (c).

(a) 1 Dowl. P. C. 6; and see *Ex parte Cohen*, 1 Harr. & Woll. 211.

(b) 4 Barn. & Ald. 47.

(c) See the previous case.

## Ex parte SCOTT.

An attorney who took a bill of exchange from a defendant, in order to settle the plaintiff's bill of costs, and who omitted to do so, but made use of the bill of exchange, cannot be called on to answer the matter on affidavit.

**GODSON** applied for a rule, calling on an attorney to answer the matters of an affidavit. The party on whose part he applied was the defendant in an action in which judgment had been recovered against him. The attorney against whom the rule was sought, who was not the attorney in the cause, sent him a message, saying, that if he sent him a bill of exchange for the amount he would settle the plaintiff's bill of costs. He accordingly sent him the bill of exchange, but the attorney omitted to pay the bill of costs, and put the bill of exchange into circulation. The defendant had since been obliged to pay the bill of costs. He submitted, that as the attorney obtained the bill of exchange in his professional character of attorney, it was a case in which the Court would exercise its summary jurisdiction.

LITLEDAL, J.—I do not think those circumstances are sufficient. He has done nothing criminal in the administration of justice.

Rule refused.

Bail Court.

## CLIFFORD v. PARKER.

**BUTT** applied for a rule, calling on the defendant and his attorney to shew cause why the attorney should not answer the matters of an affidavit, and why the rule for the allowance of bail should not be discharged, and a new writ of *capias* issue, on affidavits shewing malpractice in the attorney in hiring the bail. He submitted, that although there was no direct authority to shew that under such circumstances the Court would call on the attorney to answer the matters of an affidavit, yet that it was gross misconduct; and that the Court of *Common Pleas* having intimated that any attorney acting in this way should be struck off the rolls (*a*), it was a case in which the Court would exercise its summary jurisdiction over the attorney.

*Semble*, an attorney cannot be called on to answer the matters of an affidavit, shewing malpractice in hiring bail.

LITLEDALE, J.—I cannot grant the rule, there being no authority for me to do so; but I will give leave for an application to be made to the full Court.

Butt afterwards applied to the full Court (*b*), and a rule *nisi* was granted; the point however was never discussed, as the matter was settled.

(*a*) In *Dicas v. Warne*, 2 Dowl. P. C. 812; 4 M. & Scott, 470.

(*b*) Lord Denman, C. J., Patteson, Williams, and Coleridge, Js. were in Court.

## BLACK v. CLOUP.

**S. HUGHES**, having moved on a previous day to make a rule to compute absolute, on an affidavit which *Littledale*, J. thought insufficient for not stating what inquiry had been made for the defendant, renewed his application on a fresh affidavit. It now appeared that there had been personal service of the writ of summons on the defendant, and, on inquiry for him for the purpose of serving the rule *nisi* to compute, it was found he had left the house where he had been residing as a lodger, and at which the writ was served on him. Nothing could be learnt, from the inquiry which had been made, of his present abode, but the landlord of the lodging said he thought he would return, as he had left some valuable things under his care, but he did not know when he was likely to return. A copy of the rule had been left at his lodging, and another had been stuck up in the *King's Bench* office.

Service of a rule *nisi* to compute, at the last place where the defendant was known to have lodged but which he had left, and by sticking it up in the *King's Bench* office, held sufficient.

LITLEDALE, J.—It is clear that the copy has not reached the defendant, nor is it likely to do so. The lodging does not appear to be his regular place of residence. The rule cannot be made absolute.

*S. Hughes* on a subsequent day again renewed his application, on the authority of the cases of *Sealey v. Robertson* (*c*), and *Payett v. Hill* (*d*).

COLERIDGE, J.—You may take your rule.

Rule absolute.

(*c*) 2 Dowl. P. C. 568.

(*d*) 2 Dowl. P. C. 688.

*Bail Court.*

## MATTHEWS v. SIMS.

An issue having been directed under the 6th section of the Interpleader Act by a judge at chambers, and no objection made to the want of jurisdiction of the judge:—*Held*, that it must be considered as an issue under the act, made by consent of the parties, and that therefore it was necessary to apply to the Court for a rule for the costs of trial.

A SHERIFF having applied to *Williams*, J. at chambers, for an order under the 6th section of the Interpleader Act, 1 & 2 W. 4, c. 58, all the parties attended, and took no objection to the want of jurisdiction of the judge when sitting at chambers. An issue was ordered to try the right to the goods seized, but no order was made as to the costs. The issue went down for trial, and a verdict was found for the plaintiff.

*Busby* now applied for the costs.—If this is a case within the 6th section of the Interpleader Act, it is necessary that this application should be made to the Court. That question depends on the particular circumstances of the case, the order to try the issue having been made by a judge at chambers who has not power under the act to make the order. Such being the case, it may, perhaps, be considered as an ordinary issue, and not as one made under the provisions of the Interpleader Act, and that, therefore, it is not necessary to make this special application for the costs.

LITLEDALE, J.—As the order was made by my brother *Williams*, you had better apply to the full Court in which he is sitting.

*Busby* renewed his application there accordingly.

LORD DENMAN, C. J.—It must be taken that the parties went by consent before the judge at chambers, and, therefore, that he had all the authority of the Court. The case, therefore, will be within the 6th section of the Interpleader Act, and a rule for the costs is necessary.

PATTESON, WILLIAMS, and COLERIDGE, Js. concurred.

Rule granted.

## EDWARDS v. COLLINS.

A mistake in the copy served of a writ of summons, in the year of the king's reign in the *teste*, is merely an irregularity.

ON the 27th of *October* last the defendant was served with a writ of summons, and in the copy served the *teste* was by mistake "witness, &c. in the *third* year of our reign." The writ itself, it appeared, was correct. The eight days' time for entering an appearance having expired, the plaintiff entered an appearance pursuant to the statute. On the 4th of *November* the defendant obtained a rule *nisi* to set aside the copy and the service of the writ.

*Cowling* shewed cause, and contended that it was a mere irregularity (a); that the application ought to have been made within four days (b); and

(a) See Reg. Gen. M. T. 3 W. 4, I. 10, 1 Dowl. P. C. 473.

(b) See the cases of *Hinton v. Stevens*, 1

Harr. & Woll. 521, 4 Dowl. P. C. 283; *Chubb v. Nicholson*, 1 Harr. & Woll. 666; and *Tyler v. Green*, 3 Dowl. P. C. 439.

-that even if the defendant were entitled to the eight days within which the appearance should be entered, still the application was too late.

*Bail Court.*

EDWARDS  
v.  
COLLINS.

*Ball, contra*, contended that the copy served was a nullity, and not a mere irregularity, as it appeared from it that the writ must have long since expired (*a*), and that, therefore, the application was not too late (*b*).

LITTLEDALE, J.—It is a mere irregularity, and the application is too late.

Rule discharged, with costs.

(*a*) Stat. 2 W. 4, c. 39, s. 10.

3 Dowl. P. C. 551; *Garratt v. Hooper*, 3

(*b*) *Roberts v. Spurr*, 1 Harr. & Woll. 201,

Dowl. P. C. 28.

### RANGER v. BLIGH.

ISSUE was joined in this cause in *July* last, and notice of trial given for the first sittings in this term. No countermand was given of that notice, but a fresh notice was given for the sittings after the term.

A plaintiff having given notice of trial for an earlier sittings than he was obliged to do, did not go to trial or countermand his notice, but gave a fresh notice for the sittings when he was bound to go to trial :—*Semble*, that the defendant is not entitled to judgment as in case of nonsuit.

*C. C. Jones* now moved for a rule for judgment as in case of nonsuit, as the plaintiff had not countermanded his notice, and had not proceeded to trial according to it. He submitted, that the plaintiff, although he need not have given notice of trial until the sittings after the term, yet, having given it for the first sittings, he should have continued it from one sittings to another, and should not have passed over the second and third sittings in the term.

LITTLEDALE, J.—I do not think there was any necessity to countermand the notice. The case of *Tyte v. Steventon* (*c*) is an authority against this application, but if you think it worth while you may take a rule *nisi*.

*C. C. Jones* then declined to take a rule (*d*).

(*c*) 2 W. Black. 1298.

(*d*) See the next case.

### FELL v. TYNE.

ISSUE was joined in this cause in *Easter* Term, and notice of trial was given for the adjournment day of the sittings after the term, there being no such day according to the usual practice after that term. The plaintiff, of course, did not proceed to trial, but without countermanding the former notice, gave a fresh notice of trial on the 2d of *June* for the 20th, being the adjournment day after *Trinity* Term. The defendant then obtained a rule *nisi* to set aside the second notice of trial and subsequent proceedings for irregularity, there having been no countermand of the former notice, and on the last day of *Trinity* Term that rule was referred to the Master. The plaintiff then proceeded to trial according to his notice,

A plaintiff having given notice of trial for an earlier sittings than he was obliged to do, did not countermand it, and did not proceed to trial, but gave a fresh notice for the subsequent sittings :—*Held*, that the second notice, and a trial under it, were regular.



Bail Court.

FELL  
v.  
TYNE.

and obtained a verdict the cause being undefended, although proceedings were still going on before the Master under the rule referred to him. A rule having been obtained this term to shew cause why the verdict should not be set aside, and a new trial had, on the ground of irregularity,

*Theobald* shewed cause, and contended that the first notice of trial being given for an earlier day than was necessary by the practice of the Court, it was not necessary to countermand it before giving the second notice of trial, and that therefore that notice, and the trial under it, was regular.

*Steer, contra*, contended that there should have been a countermand of the first notice.

LITLEDALE, J.—I think that a countermand of the first notice was not necessary. The case of *Tyte v. Steventon* (a), though not exactly in point, yet in principle decides that a void notice is a nullity, and cannot be continued. So here, I think, it was not necessary to countermand the first notice, which was given earlier than was required by the practice of this Court (b). This rule, however, may be made absolute to set aside the verdict on an affidavit of merits, and on payment of costs.

The rule was then made absolute on terms.

(a) 2 W. Black. 1298.

(b) See the previous case.

### NOWELL v. UNDERWOOD.

Rule absolute, in the first instance, to increase the issues on the return of a *distringas* on a late sheriff to sell goods seized under a *f. fa.*

A *Testatum fieri fucias* issued to the late sheriff of Lincoln in January last, to levy the sum of 22*l.* debt, and 30*l.* costs. The sheriff returned, that he had seized all the goods of the defendant, and had sold part, and that the rest remained in his hands for want of buyers. In *Trinity* Term a *distringas* issued to the present sheriff to distrain the late sheriff to sell the remainder of the goods. To this the present sheriff returned, that he had distrained to the value of forty shillings.

*Alfred S. Dowling* now moved, on the authority of the case of *Philips v. Morgan* (c), to increase the issues to the full amount of the original debt and costs, as well as to the further amount of costs incurred by the delay of the sheriff, and by the necessity of making the present application. He submitted that he was entitled to 70*l.* under the circumstances, and that the rule was absolute in the first instance.

LITLEDALE, J.—You may take your rule absolute to increase the issues to that amount.

Rule absolute.

(c) 4 Barn. & Ald. 652.

Baile Court.

## PHILLIPS v. CHAPMAN.

**T**HIS was an action for an escape, and the *venue* was laid in *Middlesex*. The defendant served a rule to change the *venue* to *Surrey* on the usual affidavit, and at the same time delivered a plea that the party did not escape. A rule having been obtained calling on the defendant to shew cause why the rule for changing the *venue* should not be discharged,

The defendant may deliver his plea at the same time that he serves a rule to change the *venue*, though the plea is one which will prevent the plaintiff from bringing back the *venue* on an undertaking to give material evidence in the original county.

*Knowles* shewed cause.—This rule is moved on the ground that the plea cannot be delivered at the same time that the rule to change the *venue* is moved, but the officers of the Court say that that is the usual practice. The case of *Dickinson v. Fisher (a)* is an authority for that practice, and there is no hardship on the plaintiff.

*R. V. Richards, contra*.—Formerly, the plaintiff could have brought back the *venue* to *Middlesex*, on giving an undertaking to give material evidence in that county. The defendant, by delivering his plea at the same time that he served the rule to change the *venue*, has prevented the plaintiff doing this, as it would be impossible to perform the undertaking on the issue joined on this plea, the *King's Bench* prison being in *Surrey*. Previous to the new rules for pleading, requiring the issue to be taken on a single fact, this hardship did not arise.

LITTLEDALE, J.—My impression is, that there is no objection to the practice followed in this case, although by the new rules of pleading the plaintiff is prevented giving an undertaking to give material evidence in the original county. Besides, there is this difficulty, that if the rule to change the *venue* had been first served, and then the plaintiff had given the undertaking, after which this plea had been pleaded, the plaintiff would have been in the same situation that he is in at present, and could not have performed his undertaking. I think the better way will be to discharge this rule, but without costs.

Rule discharged, without costs.

(a) 2 Strange, 858.

## ATKINSON and others v. CLEAN.

**W**ILSON moved for a *distringas*, but it appeared that on the first and second calls, at which appointments were made according to the usual practice for the second and third calls, no hour was mentioned at which the calls would be made.

An hour must be appointed as well as the day, when the second and third calls are to be made previous to moving for a *distringas*.

LITTLEDALE, J.—It is an invariable rule that an hour must be appointed, as well as the day; the rule therefore cannot be granted.

Rule refused.

*Bail Court.*

## BYLES v. WALKER.

A summons before a judge at chambers, returnable at a time when it is well known no judge sits at chambers, cannot be treated as a nullity.

THE defendant's attorney in this case obtained time to plead by consent, on the understanding that no further time should be granted him. That time having expired on the 3d of *November*, the defendant obtained on the same day a summons for further time to plead, returnable before a judge at chambers in *Serjeant's Inn*, at ten o'clock in the morning of the next day, being a day in term. In term time no judge sits at chambers until three o'clock in the afternoon. The plaintiff's attorney attended at the judge's chambers at ten o'clock, when he found that there would be no judge there until the afternoon; he then, at eleven o'clock, signed judgment as for want of a plea. On a rule to shew cause why the judgment should not be set aside, with costs, for irregularity,

*Busby* shewed cause, and contended that the summons having been made returnable at the time when it was well known no judge attended at chambers, was a mere nullity, and therefore did not act as a stay of proceedings, and that, therefore, the judgment was regular.

*Platt, contra*, contended that the summons could not be treated as a nullity, but acted as a stay of proceedings.

COLERIDGE, J.—I think that the facts of this case do not make out that any trick was intended to be practised by the defendant. His time for pleading was out, and he obtained more time by consent, on the understanding he should not have still further time; if, therefore, he had applied again, a judge would not have granted him more time. The only question therefore is, whether this summons was a nullity. I think the plaintiff had no right to treat it as one. Though it is well known that at the time at which it was made returnable, no judge attends at chambers, still the summons should be treated as a good summons, as it is authorized by a judge. The plaintiff ought to have waited until the time when a judge did attend at chambers, when the summons would have been discharged. It would not be convenient to allow parties to treat the summons of a judge as a nullity. The judgment must therefore be set aside with costs.

Rule absolute (*a*).

(*a*) See *Spenceley v. Shoals*, 1 Will. Wol. & Dav. 196; and *Wells v. Secret*, 2 Dowl. P. C. 447.

## LYDALL v. BIDDLE.

Where an issue is directed under the Interpleader Act and the claimant refuses to proceed to trial, another claimant cannot be substituted as party to

IN a previous term an issue had been directed under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, *Lydall* being a claimant to goods seized under an execution. *Lydall* had since refused to proceed to the trial of the issue.

*R. V. Richards* now applied to the Court to substitute *Webb*, who was the issue without calling on the first claimant to shew cause against it.

another claimant, as plaintiff in the issue instead of *Lydall*, he being desirous of trying the same issue, and the question was, whether, under the circumstances, *Lydall* could be barred without being brought before the Court.

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COLERIDGE, J.—That would be barring him of his claim on affidavit, without giving him an opportunity to shew cause, which, I think, cannot be done. He must be served with a rule *nisi*.

Rule *nisi* granted to be served on *Lydall*, but not on the sheriff.

### NEWNHAM v. HANNY.

THE declaration in this case was delivered on the 26th of *October*, but it was dated on the 25th. On the 4th of *November*, the plaintiff signed judgment for want of a plea. On the 7th of *November*, the plaintiff's attorney gave notice to tax the costs the next day, on which day the defendant's attorney gave notice, that unless the plaintiff would consent to set aside the declaration and subsequent proceedings, application would be made to the Court for that purpose. The plaintiff not having consented, a rule was obtained, on the 9th of *November*, to shew cause why the declaration and judgment signed thereon should not be set aside for irregularity.

An application by the defendant to set aside a declaration, on the ground of its not being dated on the day on which it was delivered, not made until the defendant had notice of the plaintiff having taken a subsequent step, is too late.

*J. J. Williams* shewed cause.—The declaration in this case not having been dated on the day on which it was delivered, contrary to the rule of *H. T. 4 W. 4 (a)* is an irregularity merely, and the defendant ought to have applied sooner to set it aside. In the case of *Fynn v. Kemp (b)*, it was decided that the application must be made before the next step is taken in the cause. This application should therefore have been made before the plaintiff proceeded to sign the judgment and tax his costs. The defendant has not been prejudiced by the irregularity, as the eight days' time to plead was allowed to elapse after the day of the delivery of the declaration before the plaintiff signed judgment. *Horsley v. Purdon (c)* is an authority to shew that the attorney ought at the time of the delivery of the declaration to have objected to the irregularity, which is another reason why this rule cannot be made absolute. The declaration having been delivered to the party, the irregularity must have been apparent to him.

*Cleasby, contra*.—The case of *Horsley v. Purdon* is not applicable, for there the objection was to the mere fact of a plea being delivered at all; here the objection is to the contents of the declaration, the irregularity of which it could not be supposed the attorney should immediately discover. Next, as to the time when this application was made; the rule laid down by Mr. *Tidd (d)* is, that where a party commits an irregularity it is unnecessary for the opposite side to complain until he sees that the other party, by taking a subsequent step, rely on the former step as if it were regular. That rule has been complied with here, for as soon as the defendant knew by the notice to

(a) 2 Dowl. P. C. 313.

(b) 2 Dowl. P. C. 620, 4 Tyr. 990.

(c) 2 Dowl. P. C. 228.

(d) p. 514, 9th edit.

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tax costs that the plaintiff was proceeding as if the declaration was regular, he made this application. The cases of *Moffat v. Carter* (a), *Topping v. Fuge* (b), *Fletcher v. Wells* (c), and *Hill v. Parker* (d), establish that position. —[*Littledale, J.*—The cases of *Smith v. Clarke* (e), and *Hinton v. Stevens* (f), are against that position.] It is impossible to reconcile all the cases that are reported on the subject. The last of those cases differed materially in its circumstances from the present.

LITTLEDALE, J.—It is quite impossible, as has been remarked, to reconcile the cases that are reported on this subject, nor is it necessary to lay down any general rule; but in this case, looking at the circumstances, I think this application was made too late. It was a clear irregularity, as it did not comply with the rule of Court, and as it may, moreover, have misled the defendant as to the time he had for pleading. Had the plaintiff signed judgment eight days after the 25th, the day on which the declaration was dated, then there would have been a second irregularity, for which the defendant might have applied here, but that was not the case. Mr. *Cleasby* has cited many cases where the rule is laid down that a party is not bound to apply until the next step is taken after the one in which the irregularity has been committed, but, on the other hand, there are many cases where that rule has not been acted on. It is therefore necessary to look to the particular circumstances of this case. If this had been the case of a notice of a declaration being filed, then, perhaps, the application would not have been too late, but here the irregularity must have appeared at the time the declaration was delivered. The defendant might have applied to the Court before the time for pleading expired, when his attention, most probably, must have been called to the irregularity. I think on the whole, that the application was made too late, and therefore the rule must be discharged, but without costs.

Rule discharged, without costs.

- (a) 2 New Rep. 75.
- (b) 5 Taunt. 330.
- (c) 6 Taunt. 191.
- (d) 2 Chit. Rep. 165.

- (e) 2 Dowl. P. C. 218.
- (f) 1 Harr. & Wol. 521; 4 Dowl. P. C. 283.

### ROBINSON v. TAYLOR.

Issue was joined in a country cause in *Easter* vacation and no notice of trial was given for the next assizes: —*Held*, that the defendant might move for judgment as in case of nonsuit in *Michaelmas* Term.

ISSUE was joined in this cause on the 19th of *May* last, which was in the vacation after *Easter* Term. It was a country cause, and no notice of trial was given for the summer assizes. A rule having been obtained this term for judgment as in case of nonsuit,

*Whiteman* shewed cause.—This rule is applied for too early. The plaintiff is only bound to take one step in each term, and even admitting this issue is to be considered as joined in *Easter* Term, he had *Trinity* Term in which to enter the issue, and therefore was not bound to give notice of trial until this term. The judgment of *Bayley, B.* in the case of *Wingrove v. Hodson* (g),

- (g) 2 Dowl. P. C. 379, 4 Tyr. 328.

shews that this rule cannot be applied for until the third term after issue joined. *Douglas v. Winn* (a) is also an authority to the same effect.

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*Cooke, contra.*—The case of *Williams v. Edwards* (b), is a case exactly like the present in its circumstances, and there the application was held not to be too early. *Smith v. Rigby* (c) is also an authority for this rule being made absolute.

*Cur. adv. vult.*

LITLEDALE, J. afterwards (November 24th) gave judgment.—This was a rule for judgment as in case of a nonsuit in a country cause, moved in the present term. Issue was joined in *Easter* vacation, and no notice of trial was given for the assizes. The plaintiff objected that the defendant came too soon, for the plaintiff was only bound to take one step in a term, and admitting that the issue being joined in *Easter* vacation was the same thing as if it had been joined in *Easter* Term, he had *Trinity* Term to enter the issue on record, and then he had *Michaelmas* Term in which to give notice of trial. Though the rule of *H. T. 2 W. 4, I. 70* (d), says that no entry of the issue shall be deemed necessary to entitle the defendant to move for judgment as in case of a nonsuit, yet in *Williams v. Edwards, Parke, B.* says this rule is not to vary the time of moving for judgment as in case of a nonsuit. Taking it then according to the old practice, the course of the Court was, that the plaintiff might have been ruled to enter the issue in *Trinity* Term, and if he omitted to do so, he was not to be in a better situation than if he had gone on according to the course of the Court. At the end of *Trinity* Term, therefore, the cause was fully ripe for trial, and nothing more remained to be done; and as a trial in a country cause has nothing to do with the term, it was his duty to have gone to trial at the summer assizes; for it would be a most singular course of practice if he was to be allowed to pass over the assizes and wait till *Michaelmas* Term, and then give notice of trial for the spring assizes. The case of *Smith v. Rigby* is in point, as well as the case of *Williams v. Edwards*, above referred to. I am of opinion, therefore, that the defendant does not come too soon, and that the rule must be made absolute. Several cases were cited by Mr. *Wightman*, but none of them are the same as the present. I do not give any opinion as to what would have been the practice with the same dates as to a town cause (e).

Leave was afterwards given to the plaintiff to produce an affidavit to excuse his delay, so as to entitle him to have the rule discharged on a peremptory undertaking.

(a) 1 Har. & Wol. 662; 4 Dowl. P. C. 559.

(b) 3 Dowl. P. C. 183; 1 Cr. M. & Ros. 583; 5 Tyr. 177.

(c) 3 Dowl. P. C. 705.

(d) 1 Dowl. P. C. 192.

(e) See the cases of *Robins v. East*, 1 Will. Wol. & Dav. 74; *For v. M'Culloch*, Id. 183; *Stacey v. Jeffrys*, Id. 184; *Revett v. Hutchinson*, Id. T. T. 1837; and *Gough v. White*, 1 Mur. & Hutl. E. T. 1837.

## Bail Court.

## SMITH and REEVES.

1. An affidavit in support of an attachment for non-performance of the award of *T. Wood*, by mistake stated a service of the award of *T. Ward*, thereunto annexed:—*Held*, that the mistake was immaterial;

2. Such an affidavit need not state that the time for making the award had been enlarged, the enlargements having been made a rule of Court.

3. The award directed the costs should be borne in equal moieties, and that if either party paid the whole, the other should repay the moiety; the affidavit in support of an attachment for non-payment of the moiety, must state that the party had paid the whole, and it is not sufficient to state that the other party was informed that the whole had been paid.

4. The award having directed the delivery up of a particular box which was a matter not specifically referred to the arbitrators, but which had been parted with before the date of the submission, an attachment cannot be granted for non-performance of that part of the award.

**THIS** was a rule for an attachment against *Smith*, for not performing an award, by not paying two sums of 105*l.* 8*s.* 10*d.* and 30*l.* 4*s.* 9*d.*, and by not delivering up a box near the *London Docks*, marked No. 5. *Smith* and *Reeves* had been partners in business, which had been carried on at the box No. 5, mentioned, and disputes arising between them, they were referred to arbitration. The reference was of all matters in difference to two persons, with power for them to appoint a third as umpire. Power was given to enlarge the time for making the award, and the time was accordingly several times enlarged. *T. Wood* was appointed umpire, and the award was made by him within the enlarged time. The award directed the payment by *Smith* to *Reeves* of 105*l.* 8*s.* 10*d.*, and directed that the costs of the reference should be borne in equal moieties, and that if either party should pay the whole, namely, 60*l.* 9*s.* 6*d.*, the other party should repay him the moiety. The submission to arbitration, and the enlargements of the time for making the award, were made a rule of Court. On moving for the attachment, the affidavit in support of it, of the service of the award, mis-stated the umpire's name, stating a service on *Smith* of "the award and umpirage of *T. Ward*, hereunto annexed." The same deponent also swore that he saw the award thereunto annexed executed. The award itself was of course correct. No affidavit in support of the attachment was made of the enlargements of the time for making the award. The affidavit as to the costs of the reference stated, that *Reeves's* attorney had informed *Smith* that *Reeves* had paid the costs of the reference, but there was no direct affidavit that *Reeves* had in fact paid them. In answer, *Smith* swore that the box, No. 5, had been sold by him a year before the reference.

*C. C. Jones* shewed cause.—The first objection to this rule is, that it does not appear that *Smith* has been served with a copy of this award. The affidavit states, that he has been served with the award of *T. Ward*, but the person appointed umpire, and who made the award, was *T. Wood*. The next objection is, that there is no affidavit of the time for making the award having been enlarged. *Davis v. Vass* (a), *Wohlenberg v. Lageman* (b), and *Halden v. Glasscock* (c), are authorities to shew that such an affidavit is necessary. There is, moreover, no distinct affidavit that *Reeves* has paid the costs of the reference, therefore as to the sum of 30*l.* 4*s.* 9*d.*, being the moiety of those costs, the attachment certainly cannot issue. As to the delivery of the box No. 5, the affidavit of *Smith* shews that he had parted with it before the reference; and as it was not a matter expressly referred by name to the arbitrator, he had not power to award that *Smith* should deliver it up.

*Wilson, contra.*—The mistake in the affidavit of service of the umpire's name is immaterial, it being clear from the award itself, which is annexed, that it was the award of the umpire *T. Wood*. The case of *Dickens v. Jarvis* (d), in which *Halden v. Glasscock* is cited, is an express authority to shew,

(a) 15 East, 97.  
(b) 6 Taunt. 251; 1 Marsh. 579.

(c) 5 Barn. & Cress. 390.  
(d) 5 Barn. & Cress. 528.

that where the enlargement of the time for making the award is made a rule of Court, it is unnecessary, on moving for an attachment, to have an affidavit of the enlargement. That is a clear distinction between the cases cited on the other side and the present; here the enlargement having been made a rule of Court, an affidavit of the enlargements has been already produced before the Court. It appears by the affidavits that *Smith* had notice that *Reeves* had paid the whole of the costs of the reference, and if the fact was disputed, it might be suggested on the other side that it was not believed to be true. That is not done, and the Court will therefore pronounce that what *Reeves's* attorney stated as to the payment is true. The possession of the box, No. 5, was one of the matters disputed before the arbitrators, and he had therefore power to make the award respecting it.

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*Cur. adv. vult.*

LITLEDALE, J. afterwards (Nov. 25th) gave judgment.—This was an application for an attachment against *John Smith* for the non-performance of an award, in not paying the sum of 105*l.* 8*s.* 10*d.* to *William Reeves*; and in not delivering up to *William Reeves* a box, No. 5, near the *London Docks*, to which were attached certain privileges; and in not paying the moiety of the sum of 60*l.* 9*s.* 6*d.* found due for costs. The parties, *Smith* and *Reeves*, had been partners, and the business had been carried on at the above-named box No. 5, and by agreements of the date of the 5th *August*, 1836, they agreed to refer their partnership disputes to arbitration. The reference was to two persons and such person as they should appoint to be umpire or to assist them in the premises, so that the award of the two arbitrators and of such third person as they should appoint, if any such should be so appointed, or any two of them, should be made on or before the 5th of *September*; and with power for the arbitrators, by writing under their hands, to be indorsed to the said agreement, to enlarge the time for making their award as often as they should think proper. And then the agreement goes on to state, that if the arbitrators should not agree, the umpire might make the award, and that the submission to arbitration should be made a rule of Court. The arbitrators made several enlargements of the time, and also appointed *Thomas Wood* as an umpire, who made his award and umpirage on the 9th of *April*, 1836, and ordered the several things before mentioned to be done. The original submission to arbitration, the several enlargements by the arbitrators of the time, and the appointment of the umpire, were made a rule of Court in one rule. The affidavits to ground the attachment were in the usual form, but in the affidavit of the service of the copy of the award and umpirage, it is stated that the person served *John Smith* with a true copy “of the award and umpirage of *Thomas Ward*, hereunto annexed,” and at the same time shewed him the original award and umpirage. The service of the other documents was correct. In shewing cause against the rule for the attachment, *Smith* objected—1st. That the service of the copy of the award and umpirage was insufficient, as it stated it to be an award and umpirage of *Thomas Ward*, instead of *Thomas Wood*: 2nd. That there was no affidavit of the fact of the several enlargements made by the arbitrators: 3d. That the box in question, No. 5, had been sold by *Smith* before the submission to arbitration, and therefore the arbitrators had no jurisdiction over it: and 4thly, As to the moiety of the costs of 60*l.* 9*s.* 6*d.*, which were to be borne in moieties,



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and if either party should pay the whole, the other party was to repay him a moiety, that there was no affidavit that *Reeves* had paid the whole, and that till he had done so, he could not call on *Smith* to repay him a moiety.

As to the first objection, I think it is not tenable ; there certainly are cases where the document served upon the party has varied in some slight degree from the real name in the proceeding, as in *The King v. Calvert (a)*, and several cases there referred to ; but there the process served on the defendant was not correct, and therefore he was held not to be in contempt. But here the document served on the defendant is correct, for the copy of the award and umpirage is in the name of *Thomas Wood* ; and the defendant, therefore, by the service upon him and refusal to pay, is in contempt, and the only objection is the verifying it to the Court ; and as to that, I think, as the affidavit states that he was served with a true copy of the award, which is correct, and was shewn the original, which is also correct, the name *Thomas Ward*, which is inconsistent with that, may be rejected as surplusage. As to the second objection, there are several cases where it has been held that the fact of the enlargement must be verified by affidavit ; *Davies v. Vass*, *Wohlenburg v. Lageman*, *George v. Lousley (b)*, *Halden v. Glasscock*. But in *Dickens v. Jarvis* the rule is laid down differently, and Mr. J. Bayley says, "I take it to be a matter of course, that where a submission to arbitration contains a power to enlarge the time for making the award, and an enlargement of the time is made a rule of Court, that is sufficient for the purpose of obtaining an attachment, just as if the award had been made within the time originally granted. This case differs from that which has been referred to, for there the time was enlarged by a Judge's order, and that did not appear on the face of it to be made by the consent of the parties ; it appeared to be made *proprio vigore judicis*, and therefore was not binding. Here the parties agreed that an enlargement by the arbitrator should be valid. The Court must have credit for not making it a rule of Court, without a sufficient affidavit. If that were otherwise, every rule for an attachment for disobedience to a rule of Court, must be a rule *nisi*." I certainly concur in the view taken by Mr. Justice Bayley ; here all the various enlargements have been incorporated in the rule of Court, and it must be intended that the Court had proper materials for making them so ; the parties consented that the arbitrators might enlarge the time, and the copy of the rule served on *Smith* apprizes him that they had pursued the authority which he and *Reeves* had given them. As to the third objection, the box No. 5 was not specifically a subject of reference, but only as it was part of the subjects connected with the partnership, and as it had been sold by *Smith* before the submission, it is not to be considered as included in the submission, and as far as that goes the attachment cannot be enforced. On the fourth objection, the award directs that either party who pays the whole 60*l.* 9*s.* 6*d.* may recover the moiety against the other ; there is an affidavit that *Smith* was informed that the whole of the costs had been paid by *Reeves*, but there is no affidavit that in fact they had been so paid, and therefore the attachment cannot be supported as to the 30*l.* 9*s.* 6*d.* But as to the 105*l.* 8*s.* 10*d.*, there is no valid objection, and therefore as to that the rule may be made absolute, but the attachment should lie a fortnight in the office. Although *Reeves* cannot recover the

(a) 4 Tyr. 77 ; 2 Crompt. & Mees. 189 : (b) 8 East, 13.  
2 Dowl. F. C. 276.

30*l.* 9*s.* 6*d.*, the moiety of the costs, under this rule, he is not to be shut out of them altogether; but as I think it would be vexatious to *Smith* to be subject to two proceedings under the award, I think *Reeves* must undertake not to sue out any writ or process, or take any proceedings against *Smith* for non-payment of the moiety of the costs, until the expiration of one calendar month after a demand in writing for such moiety has been made by *Reeves* upon *Smith*, to be served upon him personally, or left at his usual place of abode; and if *Reeves* will not give such undertaking this rule to be enlarged till next term.

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Rule accordingly.

### WILLS v. LANGRIDGE.

THIS was a rule to enter a suggestion on the roll to entitle the defendant to double costs, under the *Middlesex* County Court Act, 23 *G.* 2, c. 33, the verdict being for less than 40*s.* The action was brought for 2*l.* 2*s.*, for business done by the plaintiff as a surgeon and apothecary, and for 1*l.* 4*s.* 4*d.* as the balance due by the defendant for the sale of a mare, which the defendant had sold for plaintiff at *Dixon's* repository in *Barbican*, in the city of *London*. The defendant resided in *High Holborn*, in the county of *Middlesex*. The action was tried before the under-sheriff, under 3 & 4 *W.* 4, c. 42, s. 17, and the jury gave a verdict for 3*l.* 0*s.* 7*d.* beyond the sum of 5*s.* 9*d.* paid into Court, which, therefore, was for the whole amount claimed. A motion was afterwards made in Court to reduce this verdict by 2*l.* 2*s.*, on the ground that the plaintiff had not proved he was a certificated apothecary, which he ought to have done, although that fact was not pleaded. After hearing the parties, the Court made that rule absolute (a), thereby reducing the verdict below 40*s.*

*Humfrey* shewed cause.—There are several objections to this rule being made absolute. In the first place, the stat. 23 *G.* 2, c. 33, s. 19, says, that where the jury find damages for the plaintiff under 40*s.*, the plaintiff shall not be entitled to costs. In this case the jury found a verdict above 40*s.*, and though it was afterwards reduced by the Court below that sum, yet that not being the finding of the jury, the case does not come within the clause in the act. Another objection is, that by the stat. 23 *G.* 2, c. 33, s. 4, it is enacted, that no person shall be liable to be summoned to the said County Court, except he were liable to be summoned to the County Court of *Middlesex* before the act, and that the act should not give jurisdiction over any cause, except such cause as the County Court of *Middlesex* might have held plea of before the act. Now, previous to the passing of that act it was necessary that the defendant should be living within the jurisdiction of the Court, and that the whole cause of action also should arise within the jurisdiction; *Tubb v. Woodward* (b). Here, although the defendant lived within the jurisdiction, it must be presumed that that part of the cause of action which was for the price of the mare, arose without the jurisdiction, as it is

1. If a jury find a verdict for a sum above 40*s.*, which is reduced below that sum by the Court on a point of law reserved, the plaintiff may be deprived of his costs under the *Middlesex* County Court Act.

2. It is immaterial that the point of law arose on the absence of some formal evidence which might have been supplied.

3. A rule cannot be granted to enter a suggestion to deprive the plaintiff of his costs, under s. 19 of that act, unless the cause of action arose within the county of *Middlesex*, as well as the defendant resided there.

4. Where it appeared that the defendant resided in *Middlesex*, but it did not appear where the cause of action arose; the Court presumed that it arose in *Middlesex*, and therefore made such a rule absolute.

5. *Seemly*, it is no objection to such a rule, that the sheriff, before whom the cause was tried, cannot give the certificate mentioned in section 19 of the act,

(a) See this case, *ante*, 250; and also *Morgan v. Ruddock*, 1 Har. & Wol. 505.

(b) 6 Term Rep. 175.

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most probable that the money was paid to the defendant at *Dixon's* repository, which was in the city of *London*. If the money was not in fact paid there, but within the jurisdiction of the *Middlesex* Court, that fact ought to have been shewn by the defendant to entitle him to the rule. Another objection is, that sect. 19 of the act, depriving the plaintiff of costs, clearly means in such actions only as might be prosecuted in the *Middlesex* Court, and by sect. 1, that is confined to sums not exceeding 40*s*. In this case the plaintiff's claim was for 3*l*. 6*s*. 4*d*., to the whole of which it is clear he is entitled by the verdict, though from the absence of some formal evidence, which might probably have been supplied, the Court thought afterwards he was not entitled to recover the whole of that sum. In the case of *Jenkinson v. Morton* (a) it was held, that where a debt was reduced below 40*s*. by a set-off, it was not a case within this act.—[*Littledale, J.*—It seems to me there may be another point also. In sect. 19 there is an exception of cases where the judge shall certify that the freehold, or title to land, or an act of bankruptcy principally came in question at the trial. Now, it may be a question whether on this trial before the under-sheriff, under the late act, he could give that certificate. It has been decided that the sheriff cannot certify to deprive a plaintiff of his costs under stat. 43 *Eliz.* c. 6, s. 2 (b). The language of that act, however, differs from the present, which may make a distinction.]—That certainly is another argument against this rule; the word “judge” in this act must, in the same way, mean a judge of the superior Courts at *Westminster*.

*Waddington, contra.*—In the legal sense of the words, this verdict, as it now stands reduced by the Court under 40*s*., is the finding of the jury. The verdict was given subject to the point of law, and therefore is to be considered as the verdict of the jury in the way it is now ultimately entered after the decision of that point of law. On the next point, that the cause of action did not arise within the jurisdiction of the *Middlesex* Court, nothing would have been easier than for the plaintiff to have sworn, in his affidavit in answer to this rule, that the money was paid to the defendant in the city of *London*. On the next point, the decision of the Court in *Jenkinson v. Morton* is not disputed, but it is clear that this plaintiff might have sued in the County Court for the only sum he has recovered, which is under 40*s*.; and as to the other sum of 2*l*. 2*s*. it is also clear that he had no legal right to it, as it must be assumed he had no certificate which would entitle him to recover it. *Chadwick v. Bunning* (c) shews that the verdict is conclusive. On the other point suggested by the Court, it is submitted that the term “judge,” in sect. 19, means the person presiding at the trial, and extends to a sheriff presiding under the late act.

*Cur. adv. vult.*

LITTEDALE, J. afterwards (*November 25th*) gave judgment.—This was a rule calling on the plaintiff to shew cause why the defendant should not be

(a) 1 *Mees. & Wels.* 300; 5 *Dowl. P. C.* 74; and see *Downes v. Ray*, 1 *Har. & Wol.* 649.

(b) *Wardroper v. Richardson*, 1 *Adol. &*

*El.* 75; 3 *Nev. & Man.* 839; see also *Claridge v. Smith*, 1 *Har. & Wol.* 667; 4 *Dowl. P. C.* 583.

(c) 5 *Barn. & Cress.* 532.

at liberty to enter a suggestion, under the 23 G. 2, c. 33, s. 19, to entitle him to double costs, on the ground that the damages recovered were under 40s. The action was brought for 3*l.* 6*s.* 4*d.*, of which 2*l.* 2*s.* was for a surgeon and apothecary's bill, and the rest for a sum of money which had been paid into the defendant's hands as the balance arising from the sale of a mare of the plaintiff, which had been sold at *Dixon's* repository; 5*s.* 9*d.* was paid into Court. The cause was tried before the under-sheriff, and the jury gave a verdict for the plaintiff for 3*l.* 0*s.* 7*d.* A motion was afterwards made in the Court of *King's Bench*, and a rule made absolute to reduce the damages to 18*s.* 7*d.*, on the ground that the plaintiff had not proved that he was duly licenced to practise as an apothecary. The plaintiff, in shewing cause against the present rule, contended, 1st. That the act of 23 G. 2, c. 33, only applied to cases where the jury gave damages under 40*s.*, whereas here they had given more, and they were reduced by the Court. It does not appear very clear from the notes of the under-sheriff, whether liberty was given to the Court of *King's Bench* to reduce the damages, but I must intend, that the parties had upon the trial consented that this should be done, as otherwise this Court would have sent the case to a new trial; and if the parties consented that the Court should have power to reduce the damages, it then became the same thing as if the jury had given the smaller verdict, which in point of law they ought to have done. It was also said, that the real debt was above 3*l.* as found by the jury, and if that be reduced on a point of law, it is not within the act; but I think that makes no difference, if it could not be recovered in point of law it is the same as if it had no existence in fact. It was also contended, that the money received by the defendant on the sale of the mare, was in fact received by the defendant at *Dixon's* repository, which is in the city of *London*, and not in the county of *Middlesex*, and that taking the whole act together, and more particularly advertng to the 1st, 4th, and 19th sections, the Court, under that act, had no jurisdiction, except in cases where the County Court had jurisdiction before the act, and which they had not in cases where the cause of action arose out of the jurisdiction. And I am of opinion, that if in fact the defendant had received the money in the city of *London*, and therefore out of the jurisdiction of the County Court of *Middlesex*, and that fact had now appeared before me, I should have been of opinion, notwithstanding the general words in the 19th section, "if the defendant shall reside in the county of *Middlesex*, and be liable to be summoned to the County Court," that, taking the whole act together, it must mean, liable to be summoned for a cause of action arising within the jurisdiction. But it does not appear from the notes of the under-sheriff that the cause of action did arise in the city of *London*; and though *Dixon's* repository be in the city, and the defendant lives in *High Holborn*, in the county of *Middlesex*, one of the people belonging to the repository may as well have taken the money up to the defendant as the defendant have sent for it. If the plaintiff had made an affidavit to shew how it was, it might have been attended to, because on the trial of this cause it was not likely to be made a question where the money was received. In the absence, therefore, of proof to the contrary, I must intend that the defendant, who without doubt resides in the county of *Middlesex*, was also liable to be summoned in that county, as it would be *prima*

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*facie* presumed that he received the money at his own domicile, and I am therefore of opinion that the rule must be made absolute.

During the argument I suggested a doubt, whether on a writ of trial before the sheriff there could be a suggestion under this act, but on further considering it I am not prepared to say that my doubt was well founded.

Rule absolute.

### WILLIAMS v. GWYNNE.

1. An agreement to refer a cause to arbitration may operate as a stay of proceedings, although it is not part of the agreement that it should so operate.  
2. The plaintiff gave notice that he should proceed to trial notwithstanding an agreement to refer the cause, and accordingly proceeded to trial, and obtained a verdict:—*Held*, that the defendant was not bound to move to set aside the trial until he had notice of the plaintiff having taken a subsequent step in the cause.

ON the 9th of *July* notice of trial before the sheriff of *Cardmarthen* was given in this cause for the 28th, at two o'clock in the afternoon. The defendant's attorney stated, that the defendant, on the 15th, agreed with him to refer the matter to arbitration, and signed an agreement accordingly. The plaintiff stated, that at the time he was drunk, and did not know what he was doing. On the 27th the plaintiff met his attorney for the first time, and told him he had entered into some agreement, but that he had received no copy of it, and did not know the nature of it; and that he was induced to sign it at the solicitation of the defendant and his friends at a tavern. The plaintiff's attorney, the same evening, wrote to the defendant to say that he should proceed to trial the next day, without any regard to any agreement he might have made with the plaintiff. The defendant received the letter the same evening, and forwarded it early next morning to his attorney, who received it about nine o'clock. The defendant's attorney lived twenty-five miles off the place where the trial was to take place. The plaintiff's attorney did proceed to trial the same day before the sheriff, and obtained a verdict. The defendant's attorney did not appear to defend, not having time, as he stated, to prepare for the trial. On the 11th of *August* the plaintiff's attorney gave notice of taxing the costs for the 12th. He taxed his costs accordingly, signed final judgment, and issued a *fiery facias*. On the 15th a summons was obtained by the defendant to appear before a judge at chambers, for the purpose of setting aside the proceedings. The judge ordered the proceedings to be stayed until the term, in order to give time for an application to be made to the Court. A rule having been obtained (on the 8th of *November*), to shew cause why the trial before the sheriff, and all the subsequent proceedings, should not be set aside for irregularity,

*R. V. Richards* shewed cause.—The plaintiff is entitled to have this rule discharged, as by a rule of Court made in the time of Queen *Anne*, mentioned in *Tidd's Practice*(a), no reference of any cause is to be a stay of proceedings, unless it is expressed in the rule of reference to be agreed that all proceedings shall be stayed. In this case, it appears that although the defendant's attorney swears to an agreement to refer the cause, yet he does not pretend to say there was an agreement to stay the proceedings. The rule ought also to be discharged, on the ground that an agreement to refer does not oust this Court of its jurisdiction; *Thompson v. Charnock*(b). Another objection to the application is, that it is too late, as the defendant ought to have made application to a judge within four days after

(a) Page 822, 9th ed. citing *Holt*, C. J. 2 Lord Raymond, 789. (b) 8 Term Rep. 139.

the trial, on the 28th of *July*, whereas he did not obtain the summons until the 15th of *August*.

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*Chilton, contra.*—The plaintiff having agreed to refer the cause, it was a breach of faith to proceed afterwards to trial; and it is therefore immaterial whether or not there was any express agreement to stay the proceedings in the meantime. The application also was made in time, as it was not necessary to make it until the plaintiff took another step in the cause after the one complained of. He took no such step until the 11th of *August*, when he gave notice of taxing the costs. The defendant's attorney was then obliged to write down to *Carmarthen*, and, having obtained an answer, got the summons on the 15th.

*Cur. adv. vult.*

LITLEDALE, J., afterwards (*Nov. 25th*), after reciting the facts of the case, continued.—The first objection to this rule is, that the agreement to refer to arbitration does not operate as a stay of proceedings, unless it is expressed that it should so operate; and a rule of Court, in the reign of Queen *Anne*, mentioned in 2 Lord *Raymond*, 789, is referred to, but I cannot find that there is any such rule. The case of *Thompson v. Charnock* was also cited in argument, where it was decided, that an agreement to refer does not oust the Common Law Courts of their jurisdiction. There is no doubt of that, but this was a case of breach of faith, and I therefore see no reason why the agreement should not operate as a stay of proceedings. Then it is said that the application was made too late; but I think that the defendant was not bound to attend to the notice of proceeding to trial, notwithstanding the agreement, and that the first notice to him was the notice of taxing the costs, and that therefore the application was in time. The rule must be absolute, on the terms of no action being brought.

Rule absolute accordingly.

### CASSEL v. Lord GLENGALL and another.

**S**TEER applied to the Court to set aside a warrant of attorney and the judgment and execution thereon given to secure an annuity, on the ground that the memorial of the annuity was not properly inrolled; and asked at the same time to add to the rule, that it should be a stay of proceedings in an action against the sheriff for a false return of *nulla bona* to a writ of execution issued on the judgment on the warrant of attorney.

It cannot be made part of a rule for setting aside a warrant of attorney to secure an annuity, that proceedings against the sheriff for a false return to an execution on the judgment on the warrant of attorney should be stayed.

LITLEDALE, J.—I cannot grant the latter part of the application, which is quite a collateral matter. A separate application must be made in the action against the sheriff for that purpose.

*Rule nisi* granted to set aside the warrant of attorney; and afterwards, on a separate application, another *rule nisi* was granted to stay the proceedings against the sheriff.

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## The KING v. LUNN.

On moving for a rule *nisi* for a *mandamus* to the steward of a manor, to inrol a deed under the stat. 3 & 4 W. 4, c. 74, s. 53:—*Semble*, that it is not necessary to attach a copy of the deed to the affidavit on which the rule is moved.

**BAINES** moved for a rule *nisi* for a *mandamus*, commanding the steward of the manor of *Wakefield* to enter on the rolls of the manor a deed of bargain and sale of certain copyhold property within the manor, pursuant to the Act for the Abolition of Fines and Recoveries, 3 & 4 W. 4, c. 74, s. 53. Application had been made to him, and he had refused. It was submitted, that it was unnecessary to annex a copy of the deed to the affidavit on which the rule was moved, as the affidavit itself stated the substance of the deed.

**LITLEDAL**, J.—If the affidavit states the substance of the deed, I think it is sufficient.

Rule *nisi* granted.

## LEWIS v. HILTON.

If a particular of set-off which is voluntarily delivered is intituled in the wrong Court, the defendant is not thereby precluded from giving evidence on his plea.

**THIS** was an action to recover a surgeon and apothecaries' bill; a set-off was pleaded, and the defendant gave a particular of his set-off. It did not appear he had been called on to do so by any order of a judge. At the trial before the under-sheriff for *Cardiganshire*, the particulars of set-off were called for, and a paper was produced, attached to the record, which was intituled in the *Exchequer* instead of this Court. It was then objected, on the part of the plaintiff, that the defendant could not go into evidence on his plea of set-off, as these particulars were wrongly intituled. The under-sheriff thought the objection good, and a verdict was found for the plaintiff for 5*l.* 5*s.* 8*d.*

*Chilton* having obtained a rule, calling on the plaintiff to shew cause why this verdict should not be set aside, and a new trial had, on account of the rejection of this evidence,

*R. V. Richards* shewed cause.—The ruling of the under-sheriff was right, as particulars intituled in the Court of *Exchequer* cannot be considered particulars in this Court.—[*Littledale*, J.—Was the order of a judge for the particulars produced?—It does not appear that it was; but these particulars having gone down as part of the record, they must be considered as made under the order of a judge.

**LITLEDAL**, J.—I think, that unless there was the order of a judge for the delivery of the particulars, the defendant was not precluded from going into evidence on his plea of set-off, because they were wrongly intituled.

The rule was afterwards made absolute on terms.

## ROBINSON v. STODDART.

A plaintiff having offered to abandon an irregular judgment he had signed, but not having actually struck it out, the defendant should not apply to the Court to set it aside.

**THE** defendant's attorney in this cause, on the last day for pleading, delivered a set of pleas not signed by counsel. The plaintiff's attorney

the same day signed judgment, treating the pleas as a nullity. Afterwards, on the same day, the defendant's attorney delivered a set of pleas properly signed, on which the plaintiff's attorney gave notice he should abandon the judgment he had signed. The defendant's attorney said he would accept the abandonment if the plaintiff would pay the costs. That was objected to, as there were in fact no costs incurred by the defendant. The judgment, therefore, was not struck out of the book, and remained still in force. A rule having been obtained, calling on the plaintiff to shew cause why the judgment should not be set aside for irregularity ;

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*Petersdorff* shewed cause.—The judgment certainly was irregular, as the regular pleas were delivered before the time for pleading expired ; but the plaintiff's attorney having offered to abandon it, the defendant's attorney should have accepted the offer, and should not have insisted on the payment of costs when none could possibly have been incurred by him. After that offer, the defendant ought not to come to the Court to set aside the judgment. The cases of *Hargrave v. Holden*(a), and *Belloti v. Barella*(b), shew that the defendant is not entitled to costs incurred subsequently to the offer.

*Alfred S. Dowling, contra*.—As long as the judgment remains in the book it is in force, and the defendant is entitled to ask the Court to strike it out as irregular.

LITTLEDALE, J.—The defendant need not have come to this Court, it was only necessary for him to have asked the plaintiff to abandon his judgment ; he was clearly not entitled to be paid any costs.

*Alfred S. Dowling* then submitted that the rule should be discharged without costs, on the plaintiff undertaking to strike out the judgment signed.

Rule discharged accordingly.

(a) 3 Dowl. P. C. 176.

(b) 4 Dowl. P. C. 719.

### KELLY v. BROWN.

IN February, 1835, this action was brought on a life policy : the plaintiff lived in *Ireland*, and was ruled to give security for costs. He produced two persons who were insufficient, he then came over himself to this country, and on making affidavit that he intended to reside here permanently, the rule to find security for costs was discharged. He shortly after returned again to *Ireland*. An order had been subsequently made by a judge at chambers on the plaintiff's attorney to state where he resided, which had been afterwards enlarged. It appeared that the plaintiff had lately been ejected from a farm he held in *Ireland*, that he was insolvent, and that it could not be discovered where he resided. The defence to the action was on the ground of fraud.

A rule cannot be granted in the alternative for the plaintiff to find security for costs within a certain time, and if not, for the defendant to sign judgment as in case of non-suit.



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Sir J. Campbell, A. G., now applied for a rule to shew cause why the plaintiff should not give security for costs within fourteen days, and if he did not do so, why the defendant should not be at liberty to sign judgment as in case of nonsuit. He submitted, that, unless such a rule was granted, the defendant would have no prospect of recovering either the costs he had already been put to, or those he would be further put to in carrying on the cause.

LITLEDALE, J.—You cannot possibly have a rule for judgment as in case of nonsuit at present, as that is a remedy given by statute in certain cases only. All you can have is a rule in the ordinary form, to find security for costs, with a stay of proceedings in the meantime.

Rule granted in the ordinary form.

### COLBRON v. HALL.

1. If a plaintiff omits to charge a prisoner in execution within the proper time, it is more than a mere irregularity, and therefore application to discharge him may be made at any time afterwards.

2. A judgment signed but not completed by taking in the roll until some time afterwards, is to be reckoned as a judgment of the time when it was signed.

3. The rule of H. T. 4 W. 4, 3, prevents a judgment signed in vacation being considered as a judgment of the previous term, so that that term cannot reckon as one of the terms within which a plaintiff must charge a prisoner in execution by the rule H. T. 2 W. 4, 1. 85.

THIS was a rule to shew cause why the defendant should not be discharged out of the custody of the Sheriff of *Middlesex*, the plaintiff not having charged him in execution in due time. The declaration was in debt, and was delivered on the 27th of *November*, 1834, which was in *Michaelmas* vacation; judgment was signed for want of a plea on the 22d of *December*, 1834, which was also in *Michaelmas* vacation; the judgment was completed by taking in the roll on the 5th of *May*, 1835, which was in *Easter* Term. The defendant was charged in execution on the 7th of *May*, 1835, and on the 7th of *October* last, a summons was taken out to discharge the defendant out of custody on the ground now moved on. The case was heard before *Parke, J.* who ordered the question to stand over for the decision of the Court.

*Butt* shewed cause.—The question here is, whether the charging the defendant in execution in *Easter* Term, 1835, was a sufficient charging within the meaning of the rule, H. T. 2 W. 4, 1. 85 (a), the judgment having been signed in the *Michaelmas* vacation preceding. That rule directs that the plaintiff shall proceed to trial or final judgment within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one. It will be contended on the other side, that the judgment signed in *Michaelmas* vacation refers back to the term, and that consequently the defendant was not charged in execution within two terms inclusive after such judgment, as by the latter part of the rule, *Michaelmas* Term is to be reckoned one, and the defendant was not charged in execution until *Easter* Term. There are several objections to this rule. In the first place, the application for the rule is made too late. The rule that a prisoner, once supersedable, is always so, applies only to cases where the proceedings are void from the beginning. This was a case of mere irregularity, and the defendant should have applied earlier. In the case of *Smith v. Sandys* (b), the proceedings from the commencement were wholly void, and the Court there takes the distinction between the case of

(a) 1 Dowl. P. C. 194. (b) 3 Adol. & El. 693; 1 Har. & Woll. 377; 5 Nev. & Man. 50,

mere irregularity and that of the proceedings being void. The second answer to this application is, that as by the first part of the rule of *H. T. 2 W. 4*, the plaintiff is bound to proceed to final judgment within three terms inclusive after declaration, and as this judgment was not completed until *Easter Term*, which is within the three terms, and not being completed until then, as it is to be reckoned from that time, therefore, the charge in execution being the same term, is clearly within the latter part of the rule. The cases of *Blackburn v. Kymer* (a) and *Butler v. Bulkeley* (b), shew that this judgment is not to be considered as final until *Easter Term*. The third answer is, that even assuming this to be a complete judgment on the 22d of *December, 1834*, the rule of *H. T. 2 W. 4*, is, that the defendant is to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one. In the present case there was no trial, judgment having been by default, and therefore *Michaelmas Term*, by the latter part of that rule, is not to be reckoned one of the two terms within which the defendant should have been charged. In the case of *Borer v. Baker* (c), the rule of *H. T. 2 W. 4*, was much considered; but in that case there had been a trial, and the case therefore was within the express provision of the rule. The case of *Melton v. Hewitt* (d), more nearly approaches to the present, and in that case it rather appears to have been the opinion of *Bayley, J.* that *Trinity* vacation, in which the judgment was signed on *cognovit*, did not reckon as one of the two terms. The cases of *Heaton v. Whittaker* (e) and *Smith v. Jefferys* (f), were decided under the old rule of Court, which differs from that of *H. T. 2 W. 4*, having the words "final judgment" as well as "trial" in the concluding part of the rule. Then it is to be considered whether the judgment relates back. Now by the rule of *H. T. 4 W. 4* (g), it is ordered that judgments are not to have relation to any other day than that on which they are signed. In the case of *Lambirth v. Barrington* (h), the Court refused to allow judgment to be entered up *nunc pro tunc*, contrary to the express directions of the legislature, and that decision must guide the Court in the present case, as the rule of *H. T. 4 W. 4*, 3, was made under the particular provisions of the stat. 3 & 4 *W. 4*, c. 42, and has therefore the force of an act of parliament.

*Knowles, contra*, was stopped by the Court as to the two first objections. —As to the third objection, that this case is not within the latter clause of the rule of *H. T. 2 W. 4*, this being a judgment by default, and not after trial, it was unnecessary to insert the words "final judgment" after "trial" in that rule, as at that time a judgment signed in vacation had relation back to the previous term. Had this case, therefore, been previous to the rule of *H. T. 4 W. 4*, doing away with the relation back of judgments, the defendant would have been supersedable by provisions of the rule of *H. T. 2 W. 4*. Now, although by the rule of *H. T. 4 W. 4*, judgments are not to relate back, yet, for the purpose of this rule, this judgment may be considered as a judgment of *Michaelmas Term, 1834*; for the meaning of the rule *H. T. 4 W. 4*, is not that a judgment signed in vacation is not to be regarded as a judgment of

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(a) 5 Taunt. 672, 1 Marsh. 278.  
(b) 8 Moore, 104.  
(c) 2 Dowl. P. C. 608.  
(d) 2 Dowl. P. C. 71, 1 Crompt. & Mees.  
(e) 4 East, 348.  
(f) 6 Term Rep. 776.  
(g) 2 Dowl. P. C. 313.  
(h) 1 Hodges, 206, 2 Bing. N. C. 149.  
679, 3 Tyr. 603.

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the previous term, but that it is not to have the effect of a judgment of the previous term as to purchasers.

*Cur. adv. vult.*

LITLEDALE, J. afterwards (*November 25th*) gave judgment.—This was an application to discharge the defendant out of custody for want of being charged in execution in due time. Declaration, *27th November, 1834*; final judgment in debt signed in *Michaelmas* vacation, *22d December, 1834*; judgment completed, *5th May, 1835*, which was in *Easter* Term. Defendant charged in execution in the same *Easter* Term, on the *7th of May, 1835*. It was objected, first, that the defendant came too late; that this was a mere irregularity on which it behoves a party to apply promptly, and though greater indulgence may be shewn to a prisoner than other persons, yet this is undoubtedly too long a time. As to that, I am of opinion that it is not an irregularity. It is a violation of a rule of Court not to charge a prisoner in execution in the prescribed time; and it is a well-known established rule, that a prisoner once supersedable for want of being charged in execution on the judgment, always continues so. *Tidd's Practice*, 9th edition, p. 367, fully explained by Mr. Justice Bayley in *Melton v. Hewitt*. The second objection was, that the judgment was not completed till *Easter* Term, 1835, and if so, he was charged in execution in due time; but I am of opinion that the judgment was completed in *Michaelmas* vacation, 1834. Final judgment was then signed, and the plaintiff might then have waived his costs, and sued out execution immediately. The next objection was, that upon the construction of the two rules of *H. T. 2 W. 4*, and *H. T. 4 W. 4*, the plaintiff was in time in charging him in execution in *Easter* Term, 1835. It may be proper to advert to the old rule of *H. T. 26 G. 3*. (The learned judge recited it.) By the rule of *H. T. 2 W. 4*, I. 85, it is directed. (He recited it.) By rule of *H. T. 4 W. 4*, 3, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation when signed, and shall not have relation to any other day." This is a parliamentary rule, and has the force of an act of parliament, and shuts out all relation to the preceding term, and therefore a judgment in *Michaelmas* vacation cannot be taken as a judgment of *Michaelmas* Term, and this judgment having been signed in *December, 1834*, is affected by it, and cannot be taken to be a judgment as of *Michaelmas* Term; and then, according to the rule of *H. T. 2 W. 4*, the plaintiff has two terms after that to charge the defendant in execution. It is a very hard case, and the consequences probably were not contemplated when the rule was made, and that may be a cause for the Court to make a new rule. This rule, however, may be enlarged, so that the opinion of the full Court may be obtained on the point.

Rule enlarged.

In the following *Trinity* Term the case came on before the full Court, when *Knowles* did not appear to support his rule, but *Littledale, J.* mentioned the facts of the case to the rest of the Court, who agreed with him in his judgment.

Rule discharged.

The KING v. The Sheriff of SHROPSHIRE, in the Case of  
CHAPPEL v. BOWDLER.

**THIS** was a rule to shew cause why an attachment against the Sheriff of *Shropshire*, for not bringing in the body, should not be set aside on payment of costs, and the question was, whether the attachment should stand as a security. The writ in the cause was issued on the 15th of *July*; on the 20th, the defendant was arrested, and the sheriff took a bail-bond, which was taken for too large a sum; on the 23d, the plaintiff had notice of the arrest, and the same day the sheriff was ordered to return the writ; on the 29th, the plaintiff filed a declaration *de bene esse*, and on the 30th gave notice that it was so filed; on the same day the sheriff returned that he had arrested the defendant, and that he was out on bail; the same day also the sheriff was ordered to bring in the body. On the 1st of *August*, the sheriff offered an assignment of the bail-bond, which was refused, as the sum for which it was taken was too large. On *Monday*, the 7th of *August*, the defendant was rendered, and on the 11th the plaintiff had notice of the render. The venue was in *Middlesex*.

If a plaintiff has lost a trial at the first sittings in a term by bail not having been put in in due time, but might have proceeded to trial at the last sittings, it is not such a loss of a trial as will entitle him to have an attachment against the sheriff stand as a security under the 5th rule of *H. T. 2 W. 4*.


*Erle* shewed cause.—The attachment in this case is strictly regular, and the question, whether it shall stand as a security, depends on whether the plaintiff has lost a trial or not. The declaration having been filed *de bene esse*, on the 29th of *July*, after which the defendant had eight days to plead, issue might have been joined by the 10th of *August*, if bail had been put in in proper time. This would have been in time to give notice of trial for the first sittings in this term. But as the plaintiff had not notice of the render until the 11th of *August*, and as by the statute 2 & 3 *W. 4*, c. 39, s. 11, no plea can be delivered between the 10th of *August* and the 24th of *October*, it was impossible to give the fourteen days notice of trial for the first sittings in this term, which was necessary, as the defendant lived more than 40 miles from *London*. The plaintiff therefore has clearly lost a trial.

*Busby, contra*.—The rule of *H. T. 2 W. 4*, V. (a), is, that the attachment shall stand as a security if the plaintiff has been prevented entering his cause for trial in the term next after that in which the writ is returnable. Here, notwithstanding the render is not to be reckoned as made until the 11th of *August*, yet on the 25th of *October*, the plaintiff might have ruled the defendant to plead, and might have proceeded to trial at the last sittings in the term. That has not been done, and the bail, on behalf of whom this application is made, are entitled to the ordinary indulgence of the Court to have the attachment set aside on payment of costs, without the attachment standing as a security. The question turns entirely on the rule of *H. T. 2 W. 4*, V. as by the old practice the plaintiff could not in this case have proceeded by attachment against the sheriff; *The King v. The Sheriff of Middlesex* (b).

**LITTLEDALE, J.**—According to the old practice the attachment could not have stood as a security in this case, but now the rule is different. By the

(a) 1 Dowl. P. C. 199.

(b) 2 Maul. & Selw. 562.

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fifth rule of *H. T. 2 W. 4*, the attachment shall stand as a security, "if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial in a town cause, in the term next after that in which the writ is returnable." If, therefore, the rule says that the attachment shall stand as a security, if the plaintiff has lost a trial in the term, it means of course that it shall not stand as a security, unless the plaintiff has lost a trial through the whole of the term. In this case the declaration *de bene esse* was filed on the 29th of *July*, and notice was given of its being filed on the 30th. The render was on the 7th of *August*, which was equivalent to bail being put in, but as notice of it was not given until the 11th, it will only be reckoned from that day. The plaintiff, however, might on the 25th of *October* have ruled the defendant to plead, and there would then still have been time to have given notice of trial for the last sittings in this term. The rule of *H. T. 2 W. 4*, makes no difference between the first and the last sittings in the term, and by the old practice there was no such difference. It seems therefore to me, that, according to the terms of the rule, the plaintiff has not been prevented from going to trial *in the term*, and this rule must be made absolute, without the attachment standing as a security.

Rule absolute.

### BRADY v. VEERES.

Where the damages laid in the declaration are exactly 20*l.* it is not necessary to enter into the recognizances required by 19 *Geo. 3*, c. 70, s. 6, and 7 & 8 *Geo. 4*, c. 71, s. 6, on removing the cause out of an inferior jurisdiction, even though the defendant knows that a less sum is sought to be recovered.

THE plaintiff sued the defendant in the Court of Requests at *Bristol*, and the defendant removed the cause into the *Tolsey* Court there. In the declaration delivered in the *Tolsey* Court, the damages were laid at 20*l.* The defendant then removed the cause into this Court by *habeas corpus*. A rule to shew cause why a writ of *procedendo* should not issue to the *Tolsey* Court at *Bristol* was then obtained, on the ground that the defendant had not entered into the recognizances required by the statute 19 *Geo. 3*, c. 70, s. 6, and 7 & 8 *Geo. 4*, c. 71, s. 6.

*Bushy*, shewed cause.—The case of *Atterborough v. Hardy* (a) is a decided authority to shew, that where the damages laid in the declaration are 20*l.* or upwards, it is not necessary to enter into a recognizance on removing the cause, and that it is no answer to say that the sum really sought to be recovered is under 20*l.* That case was decided on the statute 19 *Geo. 3*, c. 70, s. 6, which made it necessary, when the cause of action was under 10*l.*, to enter into recognizances on removing the cause. That sum has since been altered to 20*l.* by 7 & 8 *Geo. 4*, c. 71, s. 6. In the present case the damages laid in the declaration were 20*l.* exactly, and this rule must therefore be discharged.

*T. Denman Whatley, contra*.—It appears from the affidavits, that the defendant must have known that the real sum sought to be recovered was much under 20*l.* Supposing a smaller sum had been indorsed on the writ, the defendant would have been entitled, on payment of that sum and the costs, to put an end to the action; could it be afterwards said, that not

(a) 2 *Barn. & Cress.* 802.

having done so, he was not bound to enter into a recognizance on removing the cause, because the declaration laid the damages at 20*l.* or upwards, when it appeared so clearly that that cause of action did not amount to 20*l.* ?

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VIERES.

LITLEDALE, J.—It appears to me, that after the decision in *Atterborough v. Hardy*, the Court can look at the declaration only, and that it does not matter what the parties know is really sought to be recovered. A plaintiff is not bound by the indorsement on process if the defendant does not choose to pay the sum indorsed, but may recover to a greater amount. The only sum the Court can take judicial notice of, is the sum claimed by the declaration. This rule must therefore be discharged, with costs.

Rule discharged, with costs.

### THE KING *v.* HASSEL and others.

THIS was a rule obtained this term by *Heaton*, on behalf of *Sinclair*, one of the defendants in an indictment, against which *Steer* shewed cause. The facts and arguments are fully stated in the judgment.

An indictment against several persons was removed into this Court by *certiorari*, without the consent of one of the defendants, who afterwards was alone tried on it and found guilty, the other defendants having come to an arrangement with the prosecutor; he was afterwards taken on an attachment for the costs of the prosecution, but the Court, under the circumstances, discharged him.

*Cur. adv. vult.*

LITLEDALE, J. (November 25th) gave judgment.—This was a rule calling on the prosecutor to shew cause why the defendant *Sinclair* should not be discharged out of custody, as to the writ of attachment issued against him in this prosecution, for his contempt in not paying the sum of 90*l.* 10*s.* 2*d.*, and why the prosecutor should not pay the costs of the application. It appeared that an indictment had been found at the *Middlesex* Quarter Sessions against the defendant and a great many others for a riot and assault. This indictment was removed by *certiorari* into the Court of *King's Bench*, upon an affidavit made by *Rogers*, who is described in the affidavit as the clerk of the attorney of *Hassel* and the other defendants. On this occasion there would of course be given the usual recognizance under the statute of 5 & 6 *W. & M.* c. 11, (which was the act then acted upon as to the removal of indictments,) by two bail in 20*l.* each, and which, amongst other things, is for the payment of costs. The writ of *certiorari*, on the face of it, removes the indictment as to all the defendants, and the recognizance is applicable to all also. It is competent for one of several persons indicted to issue a writ of *certiorari* without the concurrence of the others, and the indictment is then removed as to all the defendants (*a*); but then it is competent for the others, if they wish the indictment to remain in the Court where it was found, to apply that the person who removes it shall give security for costs, so as to indemnify those who object to its being removed, or otherwise for a *procedendo* to issue. The indictment was tried in the Court of *King's Bench*, at the sittings after *Easter* term, 1834, and the prosecutor proposed, that if the defendants would plead guilty, and give up a cross-indictment which had been preferred against the prosecutor, and enter into their own recognisances, he would forego the costs against such

(a) But see the case of *The King v. Connop and others*, 2 Har. & Wol. 81.

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of the defendants as would come into that arrangement. This was agreed to by several of the defendants, but *Sinclair* would not consent to the arrangement, and he was found guilty and sentenced to a month's imprisonment, and the indictment in which he was the prosecutor was tried, and the defendants in that indictment were acquitted. The defendant *Sinclair* was afterwards taken upon an attachment for non-payment of the costs in respect of the indictment in question, and he now applies to be discharged from that attachment, on the ground that the indictment was removed at the costs and charges of *Hassel*, and that *Sinclair* was a total stranger to the proceedings, and that no communication was made to him of *Hassel's* intention to obtain the *certiorari*, and that the *certiorari* was applied for and obtained without the knowledge, privity, or consent of *Sinclair*. There is no distinct affidavit that he did not concur in applying for it, though he appeared and took his trial, and it is not stated that he ever objected to the removal, yet he was compelled to appear and plead and go to trial, and could not help himself, and could not have had a *procedendo*, if at all, unless at a very great expense. It appears to me on the whole of the case, that this indictment must be taken to be removed without the knowledge of *Sinclair*; and though the prosecutor did not know that to be the case, and therefore he was entitled to issue the attachment for the costs, yet when the fact is made to appear that *Sinclair* was ignorant of the *certiorari* being applied for, I think that no further proceedings ought to be taken upon the attachment, and that the defendant *Sinclair* is entitled to be discharged out of custody. But there is no ground for making the prosecutor pay the costs of the application. There is no hardship in the prosecutor losing this remedy for his costs; he has discharged the other defendants, and thereby thrown the whole costs on *Sinclair*; and though each is liable for the costs, yet if the others had been found guilty, they would probably have come to some arrangement to pay the costs amongst them. No action is to be brought in respect of *Sinclair* having been imprisoned on the attachment.

Rule absolute accordingly.

### SCAITH v. BROWN.

1. If a defendant has been arrested by process out of the *Palace Court*, and the cause has been removed into the *King's Bench*, the bail below cannot render the defendant to the county gaol under the statute 11 G. 4 and 1 W. 4, c. 70, s. 21.

2. Such an irregular render is not waived by the plaintiff declaring

*de bene esse* against the defendant as in the custody of the marshal.

3. The Court, however, set aside a rule for a *procedendo*, on the application of the bail, on payment of costs.

THE defendant was arrested by process out of the *Palace Court*; on the 19th of *September*, the cause was removed into this Court by *habeas corpus*; and on the 1st of *October*, a *procedendo* was granted as no bail above was put in. The *procedendo* was then set aside, on payment of costs, and bail above were put in. An order having been obtained on the 15th for better bail which expired on the 24th, the defendant was rendered instead, on the 20th by his bail to the county prison of *Middlesex*. On the 22nd notice of the render was given. On the 24th the plaintiff declared *de bene esse*, commencing in the old form, by stating the defendant to be in the custody of the marshal of the *Marshalsea*. On the 25th the writ of *procedendo* issued. A rule having been obtained by the bail of the *Palace Court* to shew cause why this *procedendo* should not be set aside, with costs,

*Erle* shewed cause.—The material question is, whether this render to the sheriff is a good render, within the statute 11 *G.* 4, and 1 *W.* 4, c. 70, s. 21. By the old practice, it was necessary that a render should be made to the prison of the Court out of which the process issued, but that act enabled the bail to render to the sheriff. That act, however, is expressly confined to persons arrested on mesne process issuing out of the *superior* Courts. If, then, this render was void, the *procedendo* was regular. But it is next said, that by declaring *de bene esse* against the defendant on the 24th, before the time for justification had expired, as in the custody of the marshal, the irregularity of the render, if any, was waived. That form, however, is not to be considered as a waiver: the Uniformity of Process Act, 2 & 3 *W.* 4, c. 39, under the provisions of which the rule of *M. T.* 3 *W.* 4, (a) as to the form of declarations, was made, does not extend (by section 19), to causes removed into this Court by *certiorari*; and therefore it has been thought best not to adopt the form given by that rule. There will be no hardship on the bail below by allowing the *procedendo* to stand good, as the practice in the *Palace Court* is to let them in to try the merits.

Bail Court.


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*Humphrey, contra.*—The act of 11 *G.* 4 and 1 *W.* 4, c. 70, s. 21, was intended to apply to all cases of arrest; and the *Palace Court* may, moreover, be considered as a superior Court. In the case of *Stride v. Hill* (b), the Court held, that *Dover Castle* was to be considered as a county gaol, upon an arrest within the *Cinque Ports*, to which the defendant might be rendered under the act. Even supposing the render is bad, it has been waived, not by the declaration being in this particular form, but by the plaintiff declaring at all, as he thereby has recognised the cause still to be in this Court; where it would not be if the render was irregular, for the cause would be remitted to the *Palace Court*. At any rate, as this has been a mere mistake in making the render, this Court will relieve the bail below, on payment of costs; as they will be fixed in the *Palace Court* if the defendant has no merits.

COLERIDGE, J.—The bail must be relieved, as the render was a mere mistake, though I cannot but say that the render was irregular. The *Cinque Ports* are a peculiar jurisdiction, therefore *quoad* them *Dover Castle* may well be considered as a county gaol. I do not think, however, that the *Palace Court* can be considered as a superior Court. I think also that the irregularity has not been waived. The rule therefore must be made absolute, on payment of the costs attendant upon the issuing and setting aside the writ of *procedendo*.

Rule absolute accordingly.

(a) 1 Dowl. P. C. 475.

(b) 4 Dowl. P. C. 709; 1 Mees. &amp; Wels. 37.



Bail Court.

## CLARKE v. OWEN.

1. A cause, in which there were several issues, was referred to arbitration, the costs to abide the event. The arbitrator awarded on each issue separately, and partly for each party, but gave no direction for entering a verdict or a *nolle prosequi*:—*Held*, that the award was sufficiently final, so that the costs could be taxed.

2. He also awarded that the defendant should pay a certain sum, "together with the costs of the suit and reference, so far as they shall have been taxed by the proper officer on the 7th Nov.:"—*Held*, that this was not an award of what costs were to be paid, but only as to the time when.

THIS was an action of *assumpsit*, and the declaration consisted of three counts. The defendant pleaded *non assumpsit*, and also pleas of payment and set-off to each count, on which pleas seven issues were joined. Before trial, the cause and all matters in difference were referred to an arbitrator, the costs of the suit and of the reference to abide the event. The arbitrator found the first issue for the plaintiff, and then found separately on each of the other issues on the pleas of payment and of set-off, and partly for the plaintiff and partly for the defendant on each of them. He then awarded that the defendant should pay the balance due to the plaintiff of 59*l.* 17*s.* 9*d.*, "together with the costs of the suit and reference, so far as they shall have been taxed by the proper officer, on the 7th day of November." He also found that there was no other matter in difference. He gave no directions for entering a verdict on the issues, or a *nolle prosequi*, or a discontinuance. A rule having been obtained to set aside the award, or so much of it as ordered the payment of the costs of the suit, on the ground of excess of authority in the arbitrator, and of the award not being final,

*J. J. Williams* shewed cause.—The excess of authority complained of, is, that as the costs are by the reference to abide the event, by the award the arbitrator has directed the defendant to pay the whole, although on some of the issues he has found partly for the defendant. The direction, however, as to the costs, is merely a direction of the time when the defendant is to pay them; and it leaves it open to the Master to tax them as he sees fit, according to the event of the cause. As to the award not being final, the arbitrator had no power to enter a verdict. Having found separately on each issue, and awarded how much the defendant was to pay, and that there was no other matter in difference, he has awarded all that he could; and by the separate finding on each issue, the Master is enabled to tax the costs accordingly. The case of *Hutchinson v. Blackwell*<sup>(a)</sup> shews that the arbitrator had no authority to order a verdict to be entered.

*Addison, contra*.—The order on the defendant to pay the costs is not merely as to the time when they are to be paid, but is a direction to pay "the costs of the suit," which must mean the *whole* costs of the suit; and the arbitrator has thereby exceeded his authority. The award, moreover, is not final. It is true the arbitrator could not direct a verdict to be entered, but he might have ordered a judgment by confession to be entered for the plaintiff as to part, and a *nolle prosequi* as to the rest. By leaving the cause as he has done, there is no legal event of it by which the Master can tax the costs. In the case of *Norris v. Daniel*<sup>(b)</sup> it was held, that an award that the plaintiff had a good cause of action on five out of eight counts, and that no further proceedings should be had in the action, was bad, as there was no event to authorise the taxation of costs on three of the counts.—[*Cole-*

<sup>(a)</sup> 1 Dowl. P. C. 267; 8 Bing. 331; 1 M. & Scott, 513.

<sup>(b)</sup> 10 Bing. 507; 2 Dowl. P. C. 798; 4 M. & Scott, 383.

ridge, J.—The case of *Dibben v. The Marquis of Anglesea* (a), is an authority against this rule.]—*In re Leeming and Fearnly* (b) is, however, an equally good authority in support of it.

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COLERIDGE, J.—I think this rule must not be made absolute. On the first point I have no doubt whatever. By the reference, the costs of the suit and of the reference were to abide the event, and the words of the award are, “I award that the defendant shall pay to the plaintiff the sum of 59*l.* 17*s.* 9*d.*, together with the costs of the suit and reference, so far as they shall have been taxed by the proper officer, on the 7th day of *November*.” I do not think that in that award the arbitrator takes on himself to direct any thing as to what costs are to be taxed, but he only directs as to the time when they are to be paid. I think, therefore, that that point is not substantiated. On the other point I had at first some doubt, but as the arbitrator has found distinctly on each issue, I think that to be the legal event, and that it entitles the Master to tax the costs of the reference, and also the costs of the suit accordingly. The arbitrator had no power to enter a verdict. The rule therefore must be discharged, but I shall direct nothing about the costs, and they will then be costs in the cause.

Rule discharged.

(a) 10 Bing. 569; 2 Crompt. & Mees. 722; 4 Tyr. 926.

(b) 5 Barn. & Adol. 403; 2 Nev. & Man. 232.

### BLEWITT v. TREGONNIN.

**E**RLE, on the part of the executors of the defendant, moved for a rule to shew cause why a person named *Symonds* should not come in, and pay the costs demanded of them. The action was in trespass for taking away sand from the sea shore; and the defendant, *Tregonnin*, justified as servant of *Symonds*, who, it was alleged, had a right as occupier to take the sand. The executors of *Tregonnin* had been called on to pay the costs of the cause to the plaintiff. In their affidavit, on which this motion was grounded, they swore that the defendant never instructed any person to defend the action, or took any part in the proceedings. It was also sworn, that the deponents believed that *Symonds* had employed the attorney to defend the action. It was submitted that the only case to which the present was at all similar, was that of an action of ejectment in which a landlord puts forward one of his tenants as a nominal defendant, when the Court would compel the landlord to pay the lessor of the plaintiff's costs; and that the present case did not differ in principle (c).

Rule to compel a third person to pay defendant's costs of an action, on an affidavit that it was "*believed*" he had in fact defended the action, refused.

COLERIDGE, J.—This is a proceeding between a nominal and real defendant, not between a landlord and the lessor of the plaintiff in ejectment. It would be too much extending the jurisdiction of this Court to grant this rule on an affidavit of *belief* only, that *Symonds* had employed the attorney in the cause.

Rule refused.

(c) See *Lloyd v. Evans*, 1 Will. Wol. & Dav. 50.

## Bail Court.



## GRANT v. FLOWER.

An application to set aside an interlocutory judgment for irregularity, not made until after a rule to compute was obtained, *held* too late.

ON the 1st of *August* last the writ of summons issued in this cause; on the 17th of *September* it was served; on the 21st of *October* an appearance was entered by the plaintiff; on the 25th he declared; on the 29th the defendant took out a summons to set aside the proceedings for irregularity, which was heard before Lord *Denman*, C. J. on the 31st, and dismissed. On the 2d of *November* the defendant's attorney attended at the office of the plaintiff's attorney, and examined the writ; on the 5th interlocutory judgment was signed for want of a plea; and on the 8th a letter was sent to the defendant's attorney, informing him judgment was so signed. On the 17th, no step having been taken by the defendant, a rule to compute was obtained and served, returnable on the 21st. On the 22d, a rule *nisi* to set aside the interlocutory judgment and subsequent proceedings for irregularity was obtained.

*Temple* shewed cause, and objected that the rule being for irregularity, should have been moved for earlier.

*Barstow*, *contra*, contended, that the time before the rule to compute was served did not reckon.

LITTLEDALE, J.—I think that that time must be reckoned; the application therefore was made too late, and the rule must be discharged with costs (a).

Rule discharged with costs.

(a) See the rule, *H. T. 2 W. 4*, I. 33, 1 Dowl. P. C. 187.

## Ex parte MINCHIN.

An attorney, who by mistake in not taking out his certificate, was off the roll for two days, was allowed to be re-admitted without giving the usual notice.

ALFRED S. DOWLING moved, on the 18th *November*, to re-admit an attorney without giving the usual notices. The last certificate *Minchin* took out expired on the 15th of *November*, 1835. He then did not take out his usual certificate for the next year, on account of pecuniary difficulties. Thinking that he would be entitled to take out his certificate this year at any time between the 15th of *November* and the 16th of *December*, as in ordinary cases (b), and that as that certificate would be dated on the 16th *November*, he would not be off the roll of attornies, he applied on the 17th, and found he was too late, and had been off the roll two days (c). As this arose from a mistake, it was submitted that the Court would re-admit him without the usual notice. It was admitted that he had practised while so off the roll.

LITTLEDALE, J.—He may be admitted on payment of a fine of 20*s.*, and the arrears of duty.

Rule accordingly.

(b) 54 G. 3, c. 144.

(c) 37 G. 3, c. 90, s. 31.

Bail Court.

## Ex parte BILLINGS.

**PLATT** moved for the re-admission of an attorney. He had been off the rolls thirty years, having been in the interim partly engaged in some office connected with His Majesty's Customs. He submitted that this case differed from that of *Ex parte Frost (a)*, which was a case of total abstraction from the profession.

A person who has been off the roll of attorneys for thirty years cannot be re-admitted.

LITLEDALE, J.—Thirty years is a long time, and I think amounts to a total abstraction, and that the party cannot be re-admitted.

Rule refused.

(a) 1 Chit. Rep. 558, n.

## Ex parte THOMSON.

**ALFRED S. DOWLING** moved to re-admit an attorney. It appeared, that since he had ceased to take out his certificate he had practised as an attorney in the Borough Court at *Lynn*. It was not necessary that a person should be an attorney of the superior Courts at *Westminster*, in order to enable him to practise in that court. It was submitted, that under those circumstances he was entitled to be re-admitted without payment of any fine, or of the arrears of duty.

An attorney who while off the rolls has practised in a borough court, may be re-admitted without payment of fine or of the arrears of duty.

LITLEDALE, J.—You may take the rule.

Rule granted accordingly.

## TAYLOR v. SLINGO.

**THIS** was an action for beer supplied for the defendant, which was tried before the under-sheriff of *Buckinghamshire*. At the trial evidence was given by the defendant to shew that the beer was supplied for the defendant's father, who had the same christian name; and a receipt was also produced as a receipt given to the defendant by the plaintiff, for beer supplied to the former. A verdict was found for the defendant. In *Easter* term last the plaintiff obtained a rule *nisi* for a new trial, on the ground of surprise; the receipt produced, as he alleged, having been given by the plaintiff to defendant's father for beer and other things supplied for him. On shewing cause against that rule, the defendant and his father made affidavits in which they denied the plaintiff's statements on which he had obtained the rule. After hearing the parties, the Court ordered that upon payment of costs by the plaintiff within ten days then next ensuing, to be taxed by the Master, that the verdict should be set aside and a new trial had; but in default of the costs being paid within the ten days, then, that the rule should be discharged with costs to be taxed by the Master. The plaintiff did not pay the costs within the ten days, and he was then arrested for and paid the costs of the cause. The costs on the discharge of the rule

A rule for a new trial on the ground of surprise on the plaintiff was made absolute on payment of costs within a certain time; if not paid, then the rule was to be discharged with costs. The plaintiff did not pay the costs within the time, but preferred an indictment for perjury committed by the defendant in his affidavit in opposition to the rule for a new trial:—*Held*, that the proceedings for the enforcement of the costs of the rule could not be stayed until after the trial of the indictment.

Bail Court.



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were not taxed or paid. At the *October* sessions, the plaintiff preferred two bills of indictment against the defendant and his father for perjury committed by them in their affidavits in opposition to the rule of *Easter* term, on both of which the grand jury returned a true bill. This term, the plaintiff obtained a rule to shew cause why all further proceedings under the rule of *Easter* Term should not be suspended until the indictments were determined, and the Court should further order.

*Henderson* shewed cause.—The only object of the plaintiff by this rule, is to delay the taxation of the costs of the former rule. The case of *Davis v. Cottle* (a) is an authority to shew that the Court will not again open the matters on which the former rule was obtained. The only new fact that has arisen since the former rule was before the Court, is the finding by the grand jury of two indictments for perjury. The finding of those indictments is however a mere *ex parte* proceeding, and is no ground for this Court to presume the truth of the charge. The cases of *Warwick v. Bruce* (b), and *Pott v. Parker* (c), are authorities for that position. In *Thurtell v. Beaumont* (d) the Court refused to interpose and grant the defendant a new trial, on the ground of an indictment having been found by the grand jury against the plaintiff and others for a conspiracy to defraud the defendant in the action, although a new trial was granted on the ground that new evidence had been discovered since the trial. *Secley v. Mayhew* (e) and other cases might also be cited to the same effect.

*Byles, contrd.*—In the case of *Warwick v. Bruce*, the application was made after a writ of error had been brought, and the application was consequently refused in so late a stage of the proceedings. In the case of *Thurtell v. Beaumont*, it was not an indictment for perjury that had been found; and that, therefore, is not a case that applies to the present. In *Deakin v. Praed* (f), the Court gave time to a defendant to plead until after the trial of an indictment which had been found against the plaintiff for a felony. A case is now depending also in the full Court, where a second rule *nisi* for a criminal information had been obtained against the *Satirist* newspaper, a former rule having been discharged on an affidavit for which the deponent had since been indicted for perjury, but which indictment has not yet been tried (g). In the present case, the indictments were preferred at the sessions under the statute of *Elizabeth*, and this plaintiff cannot give evidence in support of them, as he is an interested witness.

*Cur. adv. vult.*

LITLEDALE, J. afterwards (*November 28th.*) gave judgment—This was a rule to stay proceedings under a former rule, by which the plaintiff was liable to pay certain costs, until after the trial of two indictments for perjury. Several cases were cited against this rule, and in support of it a case was also cited against the *Satirist* newspaper, which was lately before the full Court; but I find that that case differed from the present, and is not, I think, in

(a) 3 Term Rep. 405.

(b) 4 M. & Selw. 140.

(c) 2 Chit. 269.

(d) 1 Bing. 339; 8 Moore, 612.

(e) 4 Bing. 561.

(f) 4 Taunt. 825.

(g) See the case *The King v. Eve*, post.

point. It seems to me that I cannot grant this rule, consistently with the practice of the Court. An action was brought, in which the defendant unexpectedly succeeded. A new trial was then applied for, on the ground of surprise, and was granted, but the plaintiff did not comply with the terms of the rule under which that new trial was granted him. Two indictments for perjury committed in opposing that rule were then preferred, and found by the grand jury. That, however, is a mere *ex parte* proceeding, and I shall not, on that account, stay the proceedings to recover the costs of the rule. The plaintiff had the option to have a new trial, and it is his own fault that those costs are imposed upon him; and being so imposed, I think he was not justified in preferring the indictments for perjury, and then making this application to stay the proceedings for the payment of costs. It was observed that these were indictments on the statute of *Elizabeth*, and that the evidence of the plaintiff was excluded; but that, I think, makes no difference, it is equally an *ex parte* proceeding to get rid of a rule of Court, and this application cannot therefore be encouraged. The rule must be discharged with costs.

Bail Court.

~  
TAYLOR  
v.  
SLINGO.

Rule discharged with costs.

### ELLIS v. GILES.

**WIGHTMAN** moved for an attachment against the defendant for non-payment of money, pursuant to an award and the Master's *allocatur*. The affidavit stated that the deponent had served the copy of the award, rule, and *allocatur*, by offering and tendering them to the defendant, but that he put his hands behind his back and refused to take them. The original award, rule, and *allocatur*, were at the same time shewn him and a demand made, but he said he would not pay the money.

Where a defendant refused to take the copy of an award, rule, and *allocatur*, which were tendered him, the Court granted a rule for an attachment.

**LITLEDALE, J.**—The only question is, whether the deponent should not have thrown the copies down on the ground, so as to allow the defendant to have taken them up after the deponent had left, if he pleased to do so; but I think enough was done.

Rule *nisi* granted.

### STRIKE v. BLANCHARD.

**HOGGINS**, on shewing cause against a rule obtained by *Archbold*, took a preliminary objection, that the affidavit on which the rule was granted was incorrect in form. It was made by a person who described himself as clerk to the attorney for the plaintiff, and gave the residence of his master. It was submitted that the clerk should describe himself as of some place (a).

An affidavit by an attorney's clerk, giving the residence of his master, but not his own, is sufficient.

**LITLEDALE, J.** thought it was sufficient (b).

The rule was then discussed on the merits, and discharged.

(a) See the rule *H. T. 2 W. 4, I. 5, 1 Dowl. P. C. 184.*

(b) See *Bottomley v. Belchamber*, 1 Har. & Wol. 362; 4 Dowl. P. C. 26.

Bail Court.



## MACKENZIE v. GAYFORD and another.

An interlocutory judgment signed in debt on a promissory note is not irregular.

**HUMFREY** shewed cause against a rule to set aside this judgment for irregularity. The irregularity complained of was, that being an action of debt on simple contract on a promissory note, the plaintiff had signed an *interlocutory* instead of a final judgment. That, he submitted, the plaintiff had a right to do.

*Mansel, contra*, submitted, that although in debt for not setting out tithes, and for the value of foreign coin, the judgment was not final; yet that in debt on a promissory note it invariably was.

LITTLEDALE, J.—I do not know why the plaintiff may not, if he pleases, sign an interlocutory instead of a final judgment; there are several sorts of actions of debt in which it may be done.

Rule discharged.

## SMITH v. RATHBONE.

If a defendant deliver a set of pleas which are bad for want of counsel's signature, whereupon the plaintiff signs judgment before the time for pleading expires, that judgment is irregular.

**THIS** was a rule to shew cause why the judgment signed by the plaintiff for want of a plea should not be set aside for irregularity. On the 1st of *November* the defendant had seven days given him to plead. On the 7th he delivered some special pleas not signed by counsel, and on the 8th the plaintiff signed judgment for want of a plea. The defendant did not afterwards deliver any other pleas.

*Thomas* shewed cause, and contended, on the authority of *Kay v. Whitehead* (a), that the judgment was regularly signed on the 8th, and that having delivered irregular pleas, the plaintiff was entitled immediately to sign judgment. He also submitted that this rule could not be made absolute, the defendant not having since delivered any good pleas.

*Busby, contra*, contended that the cases of *Pepperell v. Burrell* (b), and *Macher v. Billing* (c) shewed, that although the pleas were irregular, yet the plaintiff could not sign judgment until the time for pleading had expired, which extended to the whole of the 8th of *November*, and that the defendant had the whole of that day to deliver a fresh set of pleas properly signed.

LITTLEDALE, J.—Those cases are clear on the point, and the rule must therefore be absolute with costs. It is immaterial that the defendant has not delivered any good pleas since.

Rule absolute, with costs.

(a) 2 H. Black. 35.

(b) 1 Crompt. M. & Ros. 372; 2 Dowl. P. C. 674.

(c) 1 Crompt. M. & Ros. 577; 3 Dowl. P. C. 246; 4 Tyr. 812. See also *Dakins v. Wagner*, 3 Dowl. P. C. 535.

Bail Court.

## Baron DE REUTZEN and Wife v. JOHN.

**V**. WILLIAMS shewed cause against a rule to enlarge a peremptory undertaking. It was given in one of thirty-one actions brought to recover tolls of a market, and the peremptory undertaking had been previously enlarged four times in order to have the decision of the Court on a point of law in one of the actions, which would most probably settle all the others. The only question was, as to the terms on which the enlargement should be made.

A peremptory undertaking having been several times enlarged, can only be again enlarged for the same cause on payment of costs.

*J. Evans, contra.*

LITLEDAL, J.—After four previous enlargements, the undertaking must be enlarged on the payment of the costs of this application by the plaintiff.

Rule accordingly (a).

(a) See *Percival v. Bird*, 4 Dowl. P. C. Wol. 653; 4 Dowl. P. C. 564. 748; and *Dennehaye v. Richardson*, 1 Har. &

## HAWLEY v. SHERLEY.

**H**OGGINS shewed cause against a rule for judgment as in case of nonsuit, and contended, that the cause having been once carried down for trial, when a verdict was obtained for the plaintiff, which had been set aside and a new trial granted, the defendant could not have this rule, which was for a default in not going to a second trial.

A cause having been once taken down for trial, after which a new trial was granted, and a fresh notice of trial given, the defendant cannot have judgment as in case of nonsuit.

*Petersdorff, contra*, contended, that notice of trial having been again given, the defendant was entitled to the rule.

LITLEDAL, J.—That makes no difference; the cause has been once carried down for trial, and the statute is therefore satisfied.

Rule discharged (b).

(b) See *Gilbert v. Kirkland*, 2 Dowl. P. C. and *Doe d. Giles v. Wynne*, 1 Chit. 310. 153; *Porzelius v. Maddocks*, 1 H. Black. 101;

## HOWELL v. JACOBS.

**I**SSUE was joined in this cause in *Trinity* Term last, and notice of trial was given for the sittings in *Middlesex* after that term. The defendant afterwards ruled the plaintiff to enter the issue, and because he did not do so, signed judgment of *non-pros*. The plaintiff then obtained a summons to set

1. The plaintiff having given notice of trial, the defendant cannot sign judgment of *non-pros* for not entering the issue.

2. The defendant having irregularly signed judgment of *non-pros*, by which the plaintiff was prevented proceeding to trial according to his notice, the defendant cannot have judgment as in case of nonsuit for the default.



Bail Court.



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aside the judgment for irregularity, and before that was determined the time for trial passed by. The judgment was set aside, and this term a rule *nisi* for judgment as in case of nonsuit was obtained.

*Archbold* shewed cause, and contended, that as the plaintiff had been prevented trying the cause by the irregularity of the defendant in signing judgment of *non-pros*, he was not entitled to the rule.

*Streeton, contra.*

LITTLEDALE, J.—The plaintiff having given notice of trial, the defendant could not sign judgment of *non-pros*; and if by his default the notice of trial was rendered of no effect, he cannot now have judgment as in case of nonsuit.

Rule discharged.

### JAMES v. TREVANION.

1. In an affidavit of debt by the indorsee against the maker of a promissory note, it is not necessary to state that the defendant is indebted to the plaintiff "as indorsee."

2. It is also unnecessary to state the default of the indorsers.

THIS was an action on a promissory note by the indorsee against the maker. The affidavit of debt on which the defendant was arrested stated several indorsements of the note to the plaintiff, but did not state that he sued "as indorsee." Neither did it state the default of the indorsers.

*Steer* moved for a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on a common appearance being entered. He submitted that the form of affidavit, given in *Tidd's Practice*, was, that the defendant was indebted to the plaintiff "as indorsee," and that that form ought to have been followed. He also submitted that the default of the indorsers should be stated.

LITTLEDALE, J.—What objection can there be? The title is traced to the plaintiff, and it is not necessary after that to call him indorsee; neither is it necessary to state the default of the indorsers.

Rule refused.

### DOE d. SMITH and others v. ROE.

Service in ejectment on one tenant, of a declaration and notice addressed to another, is not good.

HUMFREY moved for judgment against the casual ejector. There were two tenants in possession, and the declaration and notice served on one, was by mistake directed to the other tenant. The service on that other was correct. It was submitted, that being directed to the tenant in possession, it was sufficient, and that, at any rate, a rule *nisi* would be granted.

LITTLEDALE, J.—That will not do. It is not sufficient even for a rule *nisi*.

Rule refused.

Bail Court.

DOE *d.* BRICKDALE *v.* ROE.

**T**HIS was a rule for judgment against the casual ejector. The affidavit stated an attempt to serve the tenant in possession on the premises the day before the term, when he could not be found, and service was in consequence made on another person on the premises. It also stated an attempt to serve the tenant with another declaration in ejectment in *March* last, as also an attempt to serve him in two different counties with a writ of summons in *June*, issued by the lessor of the plaintiff for the rent of the premises. The lessor's attorney swore that he had been attempting to find the tenant ever since *June*, and had been unable to find him; and the sheriff's officer swore that he believed he had been purposely keeping out of the way ever since.

Rule *nisi* for judgment against the casual ejector refused, although it was quite clear he had been keeping out of the way for some months before the term, as the attempt to serve him was made only the day before the term.

*Rogers* submitted that he was at least entitled to a rule *nisi*, as the case was similar to that of *Doe d. Luff v. Roe (a)*; and that the case was not within the principle of those cases where the Court refused to grant a rule on account of the first attempt to effect the service having been made just previous to the commencement of the term, as the affidavit shewed that it was quite useless to go earlier.

LITTLEDALE, J.—It does not appear to me that I can grant even a rule *nisi*. I ought not to encourage persons to put off the attempt to effect a service to the last moment before the commencement of the term, with the hope that the case may meet with the indulgence of the Court. Parties ought to go a few days before the term to effect the service.

Rule refused.

In *Hilary* Term following, a rule *nisi* was granted by *Patteson, J.* on an affidavit stating the same facts, together with attempts to serve the defendant on the 27th of *December*, and on several subsequent days before the term.

(a) 3 Dowl. P. C. 575.

DOE *d.* HUBBARD *v.* ROE.

**T**HIS was a motion for judgment against the casual ejector. The premises sought to be recovered were six cottages, which had been demised by deed to *Miles*. The ejectment was brought for breach of covenants in the lease. *Miles* occupied one of the cottages, and let the others out in single rooms to weekly lodgers. *Miles* alone had been served in order to save expense, as there were so many lodgers.

Service of a declaration in ejectment on the landlord alone, of premises let by him in single rooms to weekly lodgers, is not sufficient, unless he occupies part of the house sought to be recovered.

*Hoggins* submitted, that the occupation by the lodgers was the occupation of the landlord, and that he was entitled to a rule as to all the cottages.

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LITLEDALF, J.—The occupation by a lodger is occupation by the landlord where the landlord occupies some part of the same house himself. Here they are different houses, and you can only have a rule as to the one in which *Miles* lives.

Rule absolute accordingly.

### DOE d. FINCH v. ROE.

Rule nisi for judgment against the casual ejector refused, where the service was on the day before the term on a relation of the tenant, and the tenant on the second day of the term acknowledged he had received the declaration, but refused to say on what day.

**TOMLINSON** moved for judgment against the casual ejector.—There had been regular service on all the tenants in possession except one. The day before the term there had been service on his mother-in-law on the premises. On the first day of the term his wife acknowledged that she had received the declaration on the previous day, and on the second day of the term the tenant himself acknowledged he had received the declaration, but refused to say on what day. It was submitted, that on the authority of *Doe v. Roe (a)*, at least a rule nisi would be granted.

LITLEDALF, J.—I think enough has not been done. The attempt to effect the service should not be put off until the last moment before the term.

Rule granted as to the other tenants only.

(a) 2 Dowl. & Ry. 12.

### DOE d. HEWSON v. ROE.

If the notice at the foot of the declaration in ejectment is addressed to two persons who are joint-tenants, one only of whom is served, the rule for judgment against the casual ejector can only be for the premises in the possession of the one served.

**BYLES** moved for judgment against the casual ejector.—The premises sought to be recovered had been demised by deed to two persons who were partners in business, and carried on their trade and had joint stock on the premises, but only one of them resided there. The notice at the foot of the declaration was directed to both the tenants, but one only had been personally served; there was some doubt, therefore, as to the form of drawing up the rule. He submitted, that if the tenant who did not reside on the premises, was to be considered as a tenant in possession, he had been served by the service on his joint-tenant; but if he was not a tenant in possession, it was of course unnecessary to serve him at all, and that therefore the rule should be for judgment against the casual ejector generally, for the premises mentioned in the declaration, leaving the lessor of the plaintiff to execute the writ at his peril.

LITLEDALF, J.—The rule must be for judgment as to the premises in the possession of the tenant served, but will take no notice of the other.

Rule absolute accordingly (b).

(b) See the next case.

Bail Court.

DOE *d.* WEEKS *v.* ROE.

**R.** *V. RICHARDS*, the same day, moved for judgment against the casual ejector. The premises were in the possession of the churchwardens and overseers as parish officers, only four out of five of whom had been served. He submitted, that they might be considered as joint-tenants, and that he was entitled to have judgment generally.

Where four out of five parish officers were served in ejectment, the rule for judgment against the casual ejector can only be as to the premises in the possession of the four.

LITTLEDALE, J.—No, the rule must be as to the four served only.

Rule absolute accordingly.

DOE *d.* WATTS *v.* ROE.

**R.** *ROGERS* applied for a rule to shew cause why the tenant should not give the usual undertaking, and enter into the recognisance required by the statute 1 G. 4, c. 87, s. 1, besides entering into the common consent rule. The only point in the case was that the original lease had been assigned to the present tenant in possession.

Application granted in ejectment under the stat. 1 G. 4, c. 87, s. 1, the tenant in possession being the assignee of the original lessee.

LITTLEDALE, J. thought that circumstance was immaterial.

Rule *nisi* granted, which was afterwards made absolute, no cause being shewn.

BIDDULPH *v.* GRAY.

**W.** *H. WATSON* shewed cause, in the first instance, against a rule for discharging the defendant out of custody under the Small Debtors' Act, 48 G. 3, c. 123, and objected to the affidavit of the service of the notice of the application, given under the rule *H. T. 2 W. 4, I. 90 (a)*, that it stated the notice had been served at the plaintiff's "town residence, at Mr. Tomlins, at &c., by delivery to a servant of Mr. Tomlins." This he submitted was not sufficient.

1. Notice of an application under the Small Debtors' Act, left with a servant at a lodging house:—*Held*, not sufficient.  
2. An objection to such a notice is not waived by appearing to shew cause against the rule.

*Mansel, contrà*, submitted, that by appearing to shew cause against the rule, the objection to the service was waived. He also submitted, that the service was sufficient.

LITTLEDALE, J. —The objection is not waived by the appearance to shew cause against the rule. It does not appear from this affidavit but that the place where the notice was left, was merely the plaintiff's lodging for a few days; it is not sufficient.

Rule refused.

(a) 1 Dowl. P. C. 195; see also *Kelly v. Dickenson*, 1 Dowl. P. C. 546; and *Gordon v. Twine*, 4 Dowl. P. C. 560.

## Bail Court.

## HITCHCOCK v. SMITH.

Service of a rule to compute on "a workman at the house of the defendant," is not sufficient.

**C.** *C. JONES* moved to make a rule to compute absolute, on an affidavit stating the rule *nisi* to have been served on "a workman at the house of the defendant."

**LITLEDALE, J.**—That is not sufficient. It does not appear that the workman was even in the employ of the defendant.

Rule refused.

## SALISBURY v. SWEETHEART.

Service of a rule to compute on the landlady of the house where the defendant lodges, is not sufficient.

**C.** *C. JONES* moved to make a rule to compute absolute, on an affidavit stating that the rule *nisi* had been served on the landlady of the house where the defendant lodged.

**LITLEDALE, J.**—That is not sufficient. It does not appear that she had any authority to receive it.

Rule refused.

## THOMAS v. Lord RANELAGH.

Service of a rule to compute on a servant at the house of the defendant, who had left his house a month previously, held sufficient.

**V.** *WILLIAMS* moved to make a rule to compute absolute. The affidavit stated that the defendant had been personally served with the writ of summons at his house in *Cork Street*, that an appearance had been entered for him under the statute, and notice of declaration had been served on a servant at the house in *Cork Street*. The rule *nisi* to compute had been served at the same house on a person whom the deponent believed to be the defendant's servant, and who said that the defendant had left *London* a month since. The deponent also swore he believed that the defendant had no other residence.

**COLERIDGE, J.**—There would be no doubt if the affidavit had not stated that it had been said the defendant had left *London* a month back, but still I think you may take your rule.

Rule absolute.

## King's Bench.

## MARTIN v. STRONG, Clerk.

November 4th.

1. Words spoken by one member of a charitable association to another, respecting the conduct of a medical man employed by the association, are not a privileged communication.

2. *Semble*, if they had been spoken at a meeting of the association, held for the consideration of the medical man's conduct, it would be otherwise.

**THIS** was an action for words spoken of the plaintiff in his profession as a man-midwife. It was tried before *Littdale, J.* at the last Assizes for *Gloucester*, when a verdict was found for the plaintiff for 200*l.* It appeared that the plaintiff was the assistant to the surgeon and accoucheur of an association for the delivery of pregnant women, and that some complaints had been made of his conduct. A meeting of the association was in consequence called, at which the defendant, who was vicar of the parish and a member of the association, presided in the chair. A resolution was agreed to by the

members present, after which the defendant left the chair. The defendant immediately afterwards entered into conversation with Mr. *Hicks*, one of the members of the association, who was present, when, having referred generally to what he had heard of the plaintiff, Mrs. *Hicks* said she insisted, as a member of the association, on knowing what it was. The defendant then spoke the words which were the subject of the present action, and Mrs. *Hicks* was called as a witness to prove them. There was no malice shewn on the part of the defendant.

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Sir *W. W. Follett* now moved for a rule for a new trial, on the ground of misdirection. The learned judge, as he understood, told the jury, that had the words been spoken previous to the defendant leaving the chair at the meeting, that he had no doubt it must be considered a privileged communication; but that if spoken after the defendant left the chair, the jury must consider whether it was under such circumstances as rendered it a privileged communication. The question, whether or not this was a privileged communication, he submitted was a question of law, which should have been decided by the judge, and was not a question of fact for the consideration of the jury. He submitted also, that it was immaterial whether the defendant had or had not left the chair of the meeting; Mrs. *Hicks*, as well as the defendant, were both members of the association, and the defendant had a right therefore to make the communication now complained of, which concerned a person employed by the association. Even supposing, therefore, that the meeting was at an end, the words spoken must still be considered as privileged; *Wright v. Woodgate* (a), *M'Dougall v. Claridge* (b), *Bromage v. Prosser* (c).

Lord DENMAN, C. J. (d).—We will see my brother *Littledale* as to what occurred at the trial.

*Cur. adv. vult.*

Lord DENMAN, C. J. afterwards (*November 8th*) gave judgment.—In this case, which was an action for words spoken of a man-midwife, the question was, whether it was a privileged communication. It was supposed that Mr. Justice *Littledale* had left the question of law to the jury, whether it was a privileged communication or not; but he states that he did not do so, but laid it down, that (assuming that the circumstance of the inquiry having been conducted before the committee, would make all the proceedings before that committee privileged,) it was a question for the jury whether it was a part of the proceedings before the committee, even although the defendant might have left the chair, as it did not necessarily follow that the proceedings were at an end. He says that the jury found, that in point of fact it was no part of those proceedings. The rule was moved for also on the ground that these two parties had a right to enter into the discussion as members of this association. We do not accede to that position; it is a claim of privilege much too large. We think, therefore, that there must be no rule granted.

Rule refused.

(a) 2 Crompt. M. & Ros. 573; 1 Tyr. & Gr. 12.

(b) 1 Camp. 267.

(c) 4 Barn. & Cres. 247; 6 Dowl. & Ryl.

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296; 1 Car. & Payne, 475.

(d) *Patteson, Williams, and Coleridge, Js.* were also in Court.

King's Bench.

November 8th.

If a person who is not a general agent has money sent to him to pay over to a third person, and acknowledges he has received it for that purpose, the third person may maintain *assumpsit* for money had and received.

## LILLY v. HAYS.

THIS was an action of *assumpsit* for money had and received, tried at the sittings after last *Trinity* Term at *Guildhall*. It appeared at the trial that the plaintiff and defendant had both had some transactions with one *Wood*, and that *Wood* owed money to both. *Wood* went to reside in *Scotland*, and remitted a sum of 100*l.* to the defendant, for the purpose of paying it over to the plaintiff. The defendant, in the first instance, did not appropriate this sum to his own debt, he having received of *Wood* a bill for it, which was not then due. The defendant had mentioned to some persons that he had received this money for the plaintiff from *Wood*, and had allowed that fact to be communicated to the plaintiff. *Wood* subsequently became insane, and the defendant refused to pay the money to the plaintiff, whereupon the action was brought. It was objected at the trial that the plaintiff ought to be nonsuited, as there was no consideration moving from the plaintiff to the defendant; but Lord *Denman*, C. J. refused to nonsuit him, and a verdict was then found for the plaintiff for 100*l.*

*Kelly* now moved to set aside the verdict for the plaintiff and for a new trial.—There was in this case no consideration moving from the plaintiff for the promise so as to entitle him to recover this money. The cases of *Bourn v. Mason* (a), *Crowe v. Rogers* (b), and *Williams v. Everett* (c), and a long series of subsequent cases, leave this case quite untouched. The effect of those cases is, that where money is paid by a third person with directions to pay it over, that unless some act is done by the defendant, the plaintiff is not entitled to compel the payment over to him. Here there was no communication between the plaintiff and defendant as to the money. Even assuming that the defendant did authorize the witness to tell the plaintiff he had received the money for him, and that a promise to send him the money may thereby be implied, still there was no consideration moving from the plaintiff. The defendant derived no benefit from the money, and there was no forbearance towards him; so that until actual payment it was competent to the defendant to revoke that promise, and until then he retained the money as the money of *Wood*. The cases shewing that the consideration must move from the plaintiff, are all collected in *Selwyn's Nisi Prius*, tit. *Assumpsit*. The late case of *Price v. Easton* (d) is also an authority to shew that there was not sufficient consideration moving from the plaintiff in this case.

PATTESON, J.—There was abundance of evidence left to the jury, to shew that the defendant had stated he had this money in his hands for the use of the plaintiff, and that he had allowed that fact to be communicated to the plaintiff. The only question therefore is, whether or not there was a consideration moving from the plaintiff. It seems to me, that in a case of money had and received to the use of the plaintiff, there is seldom a direct consideration moving from the plaintiff without an agency. Put the case of a man sending a sum of money to the general agent of his creditor, and the

(a) 1 Vent. 6; 2 Keb. 454, 457, 527.

(b) 1 Stra. 592.

(c) 14 East, 582.

(d) 4 Barn. &amp; Adol. 433; 1 Nev. &amp; Man. 303.

receipt by the agent; could there be any doubt that as soon as the agent received it he would be accountable to the person for whom he had received it? Could he say, in answer, that the consideration did not move from that person? Does it not move by the money having been sent? So it seems to me that the plaintiff in this case, though not the general agent, yet having received the money for the use of the creditor, and having admitted that he had done so, becomes the debtor of the plaintiff, and the consideration does move from the plaintiff by the instrumentality of *Wood*, and that for this purpose the defendant was the agent of the plaintiff.

King's Bench.

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WILLIAMS, J.—I am of the same opinion. The defendant must be considered as the agent of the plaintiff. The act of *Wood* having been adopted by the defendant, creates a sufficient consideration for the promise, the evidence being complete that the defendant admitted the receipt of the money for and on account of the plaintiff.

COLERIDGE, J.—I agree with the principle laid down by Mr. *Kelly*. The view which my brother *Patteson* has taken of the case removes all difficulty. We must look to see whether the agency does not supply the consideration which is necessary. It seems to me that it does, and that the facts here shew sufficient consideration moving from the plaintiff.

Lord DENMAN, C. J.—I thought that the defendant made himself the plaintiff's banker in respect of this money.

Rule refused.

## GRINDALL v. GODMAN.

THIS was an action of *assumpsit* tried before *Alderson*, B. at the York Spring Assizes, 1835. The action was for expenses incurred by the plaintiff, and for the amount of the liabilities he was under to an attorney for indicting the defendant for the ill usage of his own wife. It appeared that he had grossly ill used her, and shut her up for fifteen months. He was indicted for this ill usage, convicted, and sentenced to a fine of 50*l.*, and twelve months imprisonment with hard labour. At the end of six weeks he was let out of prison by an order from the Secretary of State. It was for the expenses of this prosecution that the action was brought. There was no promise or undertaking to pay these expenses. The defendant pleaded *non assumpsit*, on which issue was joined. After the plaintiff's case was proved at the trial, it was objected that it was not a case in which he could recover, and a verdict was then found, by consent, for the plaintiff, with liberty for the defendant to move to set it aside and enter a nonsuit. A rule having accordingly been obtained in *Easter Term* last;

November 17th.

A person who has laid out money for indicting a husband for ill usage of his wife, cannot recover it from the husband on an implied *assumpsit*.

*Creswell* now shewed cause.—There can be no question in this case, but that the defendant has grossly misconducted himself towards his wife, the conviction puts that beyond dispute. Now it is a clear rule of law, that if a man ill uses his wife, any person interfering in order to protect her,



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can recover the expenses he is necessarily put to. The case of *Shepherd v. Mackoul* (a), is an authority for that position. That was an action against a husband for expenses incurred in exhibiting articles of the peace against him, for the protection of the wife. Here, instead of exhibiting articles of the peace, the plaintiff has indicted the defendant for the protection of the wife. The only distinction to be drawn is, that there the action was brought by the attorney, but that is an immaterial distinction, as part of the money now sought to be recovered has actually been spent by the plaintiff for the purpose of the prosecution, and for the remainder he has become liable to an attorney. No distinction, therefore, in principle, can be drawn. The case of *Williams v. Fowler* (b), is also an authority for the plaintiff.—[*Coleridge, J.*—There was in that case some evidence of an undertaking on the part of the defendant to pay the sum claimed.]—The decision did not go entirely, however, on that ground. The case of *Harris v. Lee* (c) shews, that although a party might, perhaps, not have a remedy for money lent to a wife to procure necessaries, on the ground that the wife might not have been supplied with those necessaries, yet, if the money was actually spent in procuring and supplying the wife with necessaries, he has a remedy against the husband. In the case of *Jenkins v. Tucker* (d), part of the claim was for money spent in paying the wife's debts; and it was intimated by the Court, that, as to that part of the claim, the action was not maintainable. If this had been an action for money lent to pay the attorney's fees and the expenses, it would have been similar to that case, but being for money actually spent in procuring necessaries, the plaintiff is entitled to recover.

*R. Alexander and Wightman, contra*, were stopped by the Court.

LORD DENMAN, C. J.—We are all satisfied that this action cannot be maintained, and therefore this rule must be made absolute. It is impossible to say that under any circumstances, the prosecution by indictment of a husband by his wife can be necessary. There is another mode of protection; she might have exhibited articles of the peace, and if that had been rendered necessary for her protection against her husband, the case of *Shepherd v. Mackoul* shews he might have been made to pay the expenses incurred. In the case of *Williams v. Fowler*, there was an express agreement on the part of the husband to pay costs. In the case of *Harris v. Lee*, the question was, whether the trustees under a husband's will could be called upon to pay money expended on a wife's behalf, to cure her of an illness arising from the husband's misconduct, and the Lord Chancellor thought it could be done, considering that what was spent was to obtain necessaries for the wife. If, therefore, an indictment preferred against a husband cannot be considered necessaries, there can be no ground for charging the husband to pay money advanced to enable her to pursue that course.

PATTESON, J.—It is quite clear, upon an examination of the cases, that the liability of a husband is confined to *necessaries*. It is impossible to say, that indicting a husband for an assault, could be a necessary method of providing for the protection of his wife.

(a) 3 Campb. 326.

(b) M'Clel. & Younge, 269.

(c) 1 Peere Williams, 482.

(d) 1 H. Black. 90.

WILLIAMS, J.—And for that reason there is no ground for raising an assumption in point of law, without which this action cannot be maintained.

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COLERIDGE, J. concurred.

Rule absolute.

### DOE *d.* STILWELL *v.* MELLISH.

November 8th.

THIS was an action of ejectment to recover some copyhold land in the manor of *Farnham*, tried before Lord *Abinger*, at the last assizes for *Surrey*. A person was called to prove a surrender of the land in question, who said that he was clerk to the Castle at *Farnham*, that he had his authority from the Bishop of *Winchester*, as lord of the manor of *Farnham*, by a patent in which there was no power given to take surrenders of copyholds, but that the custom of the manor was, that he, as well as the steward of the manor, should take such surrenders. It was objected, on the part of the defendant, that the steward ought to be called to prove the surrender, but Lord *Abinger* was of opinion that enough had been proved. A verdict was then found for the plaintiff.

It is a good custom in a manor, for a person who holds an office connected with the manor, to take surrenders of copyholds concurrently with the steward.

*Wordsworth* now moved for a new trial, and submitted that this evidence was not properly received, as there could not be a legal custom for a second person, concurrently with the steward of the manor, to receive surrenders. The Court of the manor, he submitted, was composed of the lord, the steward, the deputy steward, and the tenants, and that it did not appear that this clerk of *Farnham Castle*, was any constituent part of the Court. He referred to *Scrivens on Copyholds* (a), where the cases on the subject are collected.

Lord DENMAN, C. J.—I do not know what is meant by a constituent part of the Manor Court. This person appears to hold an office connected with the manor, and it also appears that it is the custom for the person holding that office to receive surrenders. I know of no position of law to prevent a surrender from being so made.

PATTESON, J.—This person appears to have been a sort of deputy steward for this purpose. He is a person connected with the manor, and by the custom was in the habit of receiving surrenders.

WILLIAMS and COLERIDGE, Js. concurred.

Rule refused.

(a) Pp. 153, 154, 3d edit.

### HART *v.* MARSH, Clerk.

THIS was a rule to shew cause why a writ of prohibition should not be directed to the Consistory Court of the diocese of *Hereford*, and the

November 10th.

1. After sentence in the Ecclesiastical Court, a prohibition does not lie, unless it is shewn clearly that there was a total want of jurisdiction.

In a suit in the Ecclesiastical Court, to deprive a clergyman of his living, *some* of the articles charged him with offences cognisable at common law; these were not objected to in the progress of the suit.

The sentence found that the articles were for the *most part* proved. The Court refused, after sentence, to grant a prohibition.

*King's Bench.* Arches Court of *Canterbury*. In 1833, a suit of office of the judge was promoted by *Robert Hart*, in the Consistory Court of *Hereford*, against the Rev. *G. W. Marsh*, rector of *Hope Bowdler*, in *Salop*. The articles exhibited against *Marsh*, charged him for misconduct in getting into debt, living with an unmarried woman as his wife, getting drunk, quarrelling and fighting in ale houses, assaulting a person and challenging him to fight, swearing and using threatening language, carrying on the trade of a maltster and the trade of a flannel manufacturer, and thereby exercising himself in the course of his life as a layman, cultivating a farm of 200 acres, without licence from the bishop, letting out the church yard to feed swine in, and for other acts of misconduct. The form of the sentence was, "We have found, and it doth evidently appear unto us, that the said articles, heads, positions, and interrogatories, given in and admitted in the said cause as aforesaid, are, for the most part, sufficiently proved and substantiated." *Marsh* was then sentenced to be suspended for the space of three years. *Marsh* attended the Consistory Court several times during the suit, and knew the whole contents of the articles and charges. After the sentence, he caused an appeal to be lodged in the Arches Court of *Canterbury*.

*Maule* and *Cleasby*, shewed cause against the rule.—This being an application for a prohibition after sentence pronounced, the Court will not grant one, unless it is shewn clearly that the Ecclesiastical Court has no jurisdiction; *Carslake v. Mapledoram* (a). *Marsh* has been proceeded against in his character of a beneficed clergyman, and for the purpose of depriving him of his living, and the suit, therefore, could not be commenced elsewhere. All the articles exhibited against him are matters of which the Ecclesiastical Court can take cognizance, and where the object of the suit is deprivation, it is not necessary that the articles should charge those offences only, over which the Ecclesiastical Court has exclusive jurisdiction. The case of *Free v. Burgoyne* (b), proves that position. A case also occurred some years since, where an *Irish* Bishop was proceeded against in the Ecclesiastical Court, and was deprived of his bishoprick, on the ground of having committed an unnatural crime, which is an indictable offence. All these articles charge offences which are against the canon law. The charges for carrying on the business of a maltster and flannel manufacturer, are a violation of the 76th canon. Those charges, as also that of cultivating a farm without licence, it is true, are violations of the statute 57 G. 3, c. 99, which is a re-enactment of the statute 21 H. 8, c. 13 (c), and which subjects *Marsh* to penalties, but by the 83d section of that statute, it is expressly enacted that the powers and jurisdiction of the bishop are not to be affected by it. In the same way, the other charges are mostly a violation of the 75th canon (d), and though they may partly be matters of temporal cognizance, they are at the same time matters over which the Ecclesiastical Court has jurisdiction. There is also an express authority in *Burn's Ecclesiastical Law* (e), to shew that if the Spiritual Court proceed wholly on their own canons, they shall not be at all controlled by the common law, for they shall be presumed to be best judges of their own laws. Assuming these to be matters of temporal cognizance

(a) 2 Term Rep. 473.

(b) 5 Barn. & Cress. 400; 8 Dowl. & Ry1.  
179; 2 Bligh. N. S. 65; 1 Dow. & Cl. 115;

(c) Gib. Cod. tit. 7, c. 1.

(d) Gib. Cod. tit. 7, c. 2.

(e) Tit. Prohibition, pl. 2.

merely, still the object of the suit being deprivation, this Court will not grant a prohibition; *Slater v. Smalebrooke* (a) and *Townsend v. Thorpe* (b). Any objection that can be made to the form of the sentence, in stating that the articles are for the *most part* proved, is a matter of appeal to the Superior Ecclesiastical Court.

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*R. V. Richards, contrà.*—The form of this sentence is clearly bad, as it only states that the charges are for the *most part* proved. It therefore follows, that those charges only may have been proved, over which the common law has jurisdiction. The charges of carrying on the business of a maltster and of a flannel manufacturer, are in direct violation of the statute 57 G. 3, c. 99. Under that statute, *Marsh* might be proceeded against, and it does not appear that previous to the statute 21 H. 8, c. 13, of which the 57 G. 3, c. 99, is a re-enactment, the Ecclesiastical Court had, in fact, any power to punish such an offence. The assault complained of in the same way is a matter which is cognisable by the temporal courts only. If, then, this sentence has been pronounced in matters over which the Ecclesiastical Court has no jurisdiction, the cases of *Offley v. Whithall* (c) and *Leman v. Goulty* (d), shew that it is never too late to apply to this Court for a prohibition. The mere fact, moreover, of the uncertainty of the sentence is also a ground for this rule being made absolute.

Lord DENMAN, C. J.—Supposing the two articles as to carrying on the business of a flannel manufacturer and of a maltster quite insufficient, still there are several others which are cognisable by the Ecclesiastical Courts, the most part of which the Ecclesiastical Court has found to be proved. In order to get rid of the sentence of that Court, it is necessary to shew that it had no jurisdiction whatever to pronounce that sentence. Upon this occasion we cannot find that to be so, but, on the contrary, it is quite clear that they had jurisdiction over many of the articles, and that there were only some of them which might have been objected to. The party himself, however, consented to all the articles as propounded, and the Court proceeded to sentence upon those articles, containing, of course, those which might perhaps have been objected to, and upon which it is quite possible that the Court may have held the parties not guilty. In order to set aside the sentence given, it is necessary for the party complaining to make out *clearly* that the Court had no jurisdiction whatever.

PATTESON, J.—It is laid down in several cases, that after sentence prohibition shall not go, unless the want of jurisdiction appears clearly on the face of the proceedings. Here application might have been made to this Court before sentence, but then the prohibition would only have gone to remove those articles over which the Ecclesiastical Court had no jurisdiction. After sentence, and especially after the articles have been consented to, I think the *onus* lies upon the party praying for the prohibition to shew that the Ecclesiastical Court proceeded to sentence on articles over which that Court had no jurisdiction. That has not been done in this

(a) 1 Sid. 217; 1 Keb. 721, 731, 762;  
1 Lev. 138.

(b) 2 Lord Raym. 1507; 2 Str. 776.

(c) Bunb. 17.

(d) 3 Term Rep. 3.

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case. We are called upon to presume it from the uncertainty of the sentence, but I think it must be clearly shewn that the sentence proceeded on those articles over which the Court had no jurisdiction.

COLERIDGE, J. concurred (a).

Rule discharged, with costs.

(a) Williams, J. had left the Court.

The KING v. The Churchwardens of ST. MICHAEL'S,  
PEMBROKE.

November 10th.

A person lent money on the credit of the church rates, for the purpose of re-building and enlarging a church under the 59 Geo. 3, c. 134, s. 40, and agreed that the money should not be repaid for twenty years unless at the option of the churchwardens:—*Held*, that the churchwardens were bound nevertheless to raise annually, under that section, a sum equal to the amount of the interest, to form a fund for the ultimate re-payment of the principal.

THIS was a rule calling on these churchwardens to shew cause why a *mandamus* should not issue, commanding them to pay *Ann Morgan* the instalments which had become due on the sum of 1000*l.*, borrowed upon the credit of the church-rates of the parish, under the provisions of the statute 59 Geo. 3, c. 134, and of the several other acts subsequently passed for the same object, and also the arrears of interest due thereon; or to raise by rate, pursuant to the said statute, a sufficient sum of money to pay the instalments, and also the arrears of interest, and to pay the amount so raised to *Ann Morgan*. It appeared, that in *July*, 1830, a vestry meeting of the parish was held according to the provisions of the statute 59 Geo. 3, c. 134, and the churchwardens were authorized to raise 1000*l.* for taking down, rebuilding, enlarging, and improving the parish church. This sum was advanced by *Ann Morgan*, and an indenture was entered into by her and the churchwardens in *September*, 1830, in which it was agreed that the said sum of 1000*l.* should not be called in and paid off before the expiration of twenty years, unless the churchwardens should be desirous of paying off the same at any time before, or as soon as a sufficient sum should be raised by means of the rates or otherwise, and that in the meantime interest at the rate of five per cent. should be paid. Part of the interest had been paid, but becoming in arrear, *Ann Morgan's* solicitor had collected the church-rates that had been made, according to a power in the deed of mortgage given her for that purpose. It was uncertain from the affidavits what was the amount collected, and what was the sum due for interest, but no rate had been made for the payment of any part of the principal.

*Maule*, shewed cause.—This *mandamus* is applied for in order to put in force the provisions of the statute 59 Geo. 3, c. 134, s. 40. By that section the churchwardens are authorized and empowered to make rates for the payment of the interest of money borrowed, and “for providing a fund of not less than the amount of the interest of the sum advanced for the repayment of the principal thereof, or for repaying such principal in such manner, and at such times, and in such proportions as shall be agreed upon with the persons advancing any such money.” It does not appear that under that section, in other cases generally, it is imperative on the churchwardens to raise a sum annually equal to the amount of the interest for the re-payment of the principal, but by the latter part of the enactment they are clearly not bound to do so in this case, as it has been expressly agreed that the principal shall not

be paid off before the expiration of twenty years, unless at the option of the churchwardens. That section differs considerably from the 14th as to the re-payment of money borrowed for repairing churches. This *mandamus*, therefore, as to the principal sum is premature, and cannot be had until the expiration of the twenty years. Neither will the Court grant the *mandamus* as to the payment of interest, for repeated applications have been made for an account of what has been received by *Ann Morgan* on account of the rates, but such an account has never been given.

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Sir *W. W. Follett*, *contrà*.—The intention of the act is, that a sum equal to the amount of the interest should be *raised* annually for the re-payment of the principal. By the mortgage deed, *Ann Morgan* may not be entitled to have this sum annually *paid* over to her, but that does not lessen the duty of the churchwardens to raise the sum. If this sum is not now so raised annually, and at the end of twenty years a *mandamus* is applied for, the Court will refuse it, on the ground that the churchwardens are not bound to raise the whole in one sum, but must raise it gradually.

LORD DENMAN, C. J.—There is no doubt but that the writ of *mandamus* must go to compel the churchwardens to raise the interest now due, and I think also to make a rate for a sum equal to the interest, for the re-payment of the principal. The word “annual” is not certainly in the act of parliament, but it is clear that the intention of the act is, that annual instalments of the principal should be raised. It is impossible to make sense of the enactment without supposing it should be so raised. Then, with regard to paying the principal, I do not think the party is entitled to be *paid* any thing except the interest, because by the agreement she has postponed the re-payment of the principal to the end of twenty years. That re-payment must be optional on the part of the churchwardens, because the postponement is for the purpose of giving them an opportunity of using the money in the meantime in a more beneficial way for the parish, and which will have the effect of making the parish better able ultimately to repay the sum due. The writ must therefore go to raise the interest, and a fund equal to that interest.

PATTESON, J.—The *mandamus* must be modified in that way. It will be to raise the interest now due, and a fund equal to the interest for the last six years, for the liquidation of the principal.

COLERIDGE, J. concurred (*a*).

Rule absolute in that form.

(*a*) *Williams*, J. had left the Court.

King's Bench.

## The KING v. The Minister and Churchwardens of Stoke DAMEREL.

November 10th.

1. Where an office is full by a void election, and the right to appoint to it cannot be tried in any other way, the Court will grant a *mandamus* to try the right.

2. But where a person was appointed sexton of a parish by the minister, in whom the right to appoint *primâ facie* is, the churchwardens refused to call a vestry meeting for the parishioners (who also claimed the appointment) to elect one, and it appeared that there was another method of trying the right, the Court refused to grant a *mandamus* to the minister and churchwardens to call the vestry meeting.

3. Although it was in the power of the person appointed sexton to prevent the other method of trying the right being resorted to, by refraining from claiming his fees, whereby the evidence of the right in the parishioners would in time be lost by the death of parties.

A RULE was obtained in *Hilary* Term last calling upon the minister and churchwardens of *Stoke Damerel* to shew cause why a *mandamus* should not issue, commanding them to convene a vestry meeting for the purpose of electing a proper person to fill the office of sexton of the parish. The facts of the case were as follows:—The living of *Stoke Damerel* was under sequestration, the profits being received by the Bishop as sequestrator. The Rev. Mr. *Mitford* was the officiating minister under the sequestration. The late sexton of the parish, *John Garland*, having died, a Mr. *Elms* canvassed the parish as his successor. The office was held for life, and had no salary attached to it, the remuneration depending entirely on the fees. Mr. *Mitford* appointed a Mr. *Symons* to the office, and his appointment was confirmed by the rector, who was residing at *Brussels*. Mr. *Mitford* and the churchwardens refused to convene a meeting for the purpose of enabling the inhabitants to elect a sexton, and then Mr. *Elms*, who was vestry clerk, convened a vestry for that purpose. The parish was polled, and *Elms* was declared to be duly elected. The meeting in the church on that occasion being without the sanction of the minister, proceedings had been commenced against Mr. *Elms* in the Ecclesiastical Court. The present rule was subsequently applied for, the applicants contending that the right of election was in the parishioners at large; the defendants contended that it was an ecclesiastical appointment, to which the ordinary, rector, officiating minister, or some other person having ecclesiastical jurisdiction, had the right of appointing. The last person who filled the office of sexton occupied it for upwards of fifty years. There were affidavits on both sides as to the circumstances attending his election as well as a previous one. These affidavits agreed as to the facts of a parish meeting, and votes being given, but differed as to the explanation and cause of those facts; the affidavits for the applicants stating that the parishioners on these occasions exercised a right of election; those for the defendants, that the meeting was merely for the purpose of ascertaining the wishes of the parishioners, and that the actual appointment was by Dr. *Blackett*, the then rector. There were also contradictory statements as to expressions used by Dr. *Blackett* on the occasion.

Sir *W. W. Follett*, and *Crowder*, now shewed cause against the rule.—There is no doubt but that at common law the appointment is in the rector, and it ought to be shewn by the other side that there is a special custom for the inhabitants to appoint. That is not done sufficiently. There is, moreover, no instance of this Court having interfered to cause a meeting to be convened for a merely ecclesiastical purpose like the present. In an *Anonymous* case (a), an application similar to the present was refused, and the Court said, that they could not take notice in whom the right lay to call a vestry, and consequently did not know to whom the *mandamus* should be directed. The case of *Dawe v. Williams* (b) may also be cited

(a) 2 Strange, 686.

(b) 2 Add. Ecc. Rep. 130.

as bearing on the question. In *The King v. The Churchwardens of St. Peter's, Colchester* (a), this Court refused to issue a *mandamus* to make a church-rate, on the ground that it was a matter of an ecclesiastical nature. In *Wilson v. M<sup>c</sup>Math* (b), a prohibition was refused on similar grounds. Besides, the office is now full, and there is no instance of this Court interfering with respect to an office which is already full. In *The King v. The Mayor of Colchester* (c), a *mandamus* was refused on that ground. The parishioners have another course open to try the right, namely, by refusing to pay the sexton's fees, when the question may be tried either in an action brought by the sexton for his fees, or by paying the fees under a protest, and then bringing an action to recover them back. The Court will not make this rule absolute unless the parishioners have no other means by which to try the right. The difficulty which arose in the case of *The King v. The Inhabitants of Wix* (d), namely, that one of the persons to whom the *mandamus* is addressed is the person claiming the right, also arises in this case, as the minister claims to be entitled to nominate to this office.—(They were then stopped by the Court.)

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*Erle and Wightman, contrd.*—Unless it can be shewn that there is any other way in which the right to appoint to this office can be tried, the Court will make this rule absolute. It is clear that a *quo warranto* will not lie (e). The late case of *The King v. Ramsden* (f) decides that point. It is then said that any parishioner may try the right by refusing to pay the fees, or else by paying them when demanded under protest. This method of trying the right, however, is not within the power of the parishioners, for they have no power of compelling the sexton either to bring his action for his fees, or to make such a demand for them as will enable them to maintain an action. The person who is now appointed sexton, by lying by, and not enforcing his rights, is daily strengthening his title, as the last election was fifty years back, and the evidence to support the special custom for the parish to elect, is, consequently, daily diminishing. In the absence of proof of such special custom, the right to appoint would be determined to be in the rector as at common law. There is reasonable ground to suppose, from the affidavits in this case, that the right to appoint to the office is in the parishioners at large, and it is clearly an office for which a *mandamus* will lie. *Ile's case* (g) is an authority directly in point. In the case of *The King v. St. Margaret's, Westminster* (h), a *mandamus* was granted to call a meeting for the purpose of ascertaining the monies and rates to be assessed for the repairs of a church. There, the *mandamus* was directed to the churchwardens, who are the proper persons to call the meeting. In the present case they have refused to call the vestry, which is a ground for granting the *mandamus*. *Dawe v. Williams* only shews that vestries for church matters are to be called by the churchwardens, with the consent of the minister, and is therefore an authority for this *mandamus*. Then it is said that the office is full, and that therefore a *mandamus* will not lie; but the appointment that has

(a) 5 Term Rep. 364.

(b) 3 Barn. &amp; Ald. 241.

(c) 2 Term Rep. 259.

(d) 2 Barn. &amp; Adol. 197.

(e) Selw. Nisi Prius, tit. Quo Warranto.

(f) 3 Adol. &amp; El. 456; 5 Nev. &amp; Man.

325; See also *The King v. Beedle*, 3 Adol. & El. 467.

(g) 1 Vent. 143, 153; 2 Keb. 802, 807, 820; T. Raym. 211.

(h) 4 M. &amp; Selw. 250.



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here taken place is a totally void appointment, and therefore that point does not arise.

LORD DENMAN, C. J.—There were several difficulties in the way of coming at this question, which seem to be removed. I think the refusal on the part of the minister and churchwardens sufficient, and that in a case where the inhabitants wish to have a vestry called, and a request has been refused, it is reasonable to direct the *mandamus*, not to the inhabitants at large, but to the churchwardens, directing them to summon the inhabitants. Then we come to the question, whether this is a case in which a *mandamus* ought to issue. In the first instance, it appeared to me that there was no distinct proof of any custom in the inhabitants to interfere with the right of the minister to appoint the sexton; but, on looking further into the affidavits, it appears there was evidence to shew that the last election was of that nature. Then it is for us to see whether there is sufficient ground for issuing the *mandamus*. The office has been already filled by that person, who, by the ordinary course of law, has the power to appoint to it. The minister has appointed, and the inhabitants think that they have a right to appoint, and they accordingly ask for a *mandamus*. I must own it appears to me, that unless there is a very strong case to shew that what has been done is void, we ought not to issue the writ. I think that there is no such case here, and I think, moreover, that there is another remedy. We cannot look to the particular circumstances under which it may be more or less politic to interfere. Here, it is most probable that the party will demand his fees, and it is a clear rule of law, that a party unwilling to recognise the officer, may dispute his right by refusing to pay those fees; or if the fees are received, the party may bring his action for the extortion, and recover them back, and thus try the right to the office. I think we cannot presume that an officer will hold his office without regard to the emolument. It appears to me, therefore, that there is a better and more convenient remedy than a *mandamus*, and that we ought not to give the sanction of our authority to a supposed custom, interfering with the usual right of appointment to the office, of the existence of which custom we are not convinced.

PATTESON, J.—I am of the same opinion. I think all the minor points are removed, and that it comes to the question, whether, under the circumstance of the office being already filled by the appointment of a person by the minister, the Court will interfere by *mandamus*. I have not been able to find any reported case, where it has been decided that a *mandamus* will lie to elect to an office filled already by what is called a void election, but I have a strong recollection that such cases have occurred, and that where the Court has been satisfied that an office has been so filled, and the right cannot be tried by a *quo warranto*, that the Court has issued a *mandamus* in order to proceed to a new election. There is a case of *The King v. The Corporation of Bedford (a)*, where the Court did grant a *mandamus* to proceed to the election of a mayor, the mayor who had been elected not being properly qualified; but the Court expressed a doubt whether they could with propriety grant the writ. This is the only case I have been able to find, but

(a) 1 East, 79; and see *The King v. The Corporation of The Bedford Level*, 6 East, 356.

I am confident that the practice is, that when the question cannot be tried by *quo warranto*, then the Court will grant a *mandamus* to proceed to a new election. I do not think, however, that that remedy can be granted, except in cases where the Court is fully satisfied that the election is void. In this case *prima facie* the appointment by the rector would be right. It is said on the other side, that there is a custom for the inhabitants to elect the sexton, and some evidence is given in the affidavits by a person who was present at the last election, but that evidence is not conclusive. Nevertheless the office is full by the appointment of the rector. Under these circumstances, I should say, if there were no other remedy, it would be right to grant a *mandamus*. But there is clearly another remedy, either by refusing to pay the sexton's fees, or by paying them, and then bringing an action to recover back the amount. The sexton will hardly continue in his office without resorting to some method of enforcing his fees; but whether he does so or not, we cannot enter into the question of the convenience or inconvenience of leaving the matter in that state.

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WILLIAMS, J.—I am of the same opinion, for it appears to me that there is unquestionably another remedy, which remedy I cannot consider to be so remote as is suggested. We must consider the sexton as being in the office, and of course endeavouring to recover the fees of that office. I cannot conceive that he will wait until all the evidence is extinguished, in order to disprove the custom of election in this parish. That custom is so far doubtful, that the Court ought not to interfere where there is another remedy which has been pointed out already.

COLERIDGE, J.—I assume that a *mandamus* would lie for this office, and I also assume that a *quo warranto* would not; still I think, under the particular circumstances of this case, we ought not to grant the *mandamus*. My opinion rests very much on the grounds stated by the rest of the Court. This office is full, and must be taken to be so by the appointment of him in whom the right *prima facie* is vested. The affidavits bring that right perhaps into some question; but the balance is still, I think, in favour of the right. However, the office being full, and by him in whom the right is *prima facie* vested, I should expect to see the balance of evidence very clearly the other way, in order to satisfy my mind, before I should think it right to issue a *mandamus*, if there were any other method of trying the right. I am satisfied that there is another mode, and though it is said that it is not so convenient, because the sexton may suspend its operation for a time, still I do not think that the present is a state of things which calls upon us to interfere by *mandamus*. The inhabitants are of opinion that they have the right to appoint, and I think we may take it for granted that they will have in a short time the means of bringing that right to trial.

Rule discharged, without costs.

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## DOE d. HARRIS v. SAUNDER.

November 15th.

A local inclosure act passed before the general statute 1 & 2 G. 4, c. 23, enacted, that the lands to be allotted and awarded, immediately after such allotments were made, should be, remain, and enure to the persons to whom they were allotted, who should from thenceforth stand and be seized and possessed thereof, to such and the same uses &c., as the several and respective messuages &c., in lieu of which such allotments should be made, were held under. The commissioners appointed under this act, set out an allotment to a person in lieu of certain open field lands and rights of common, and gave him possession of it, but did not execute their award until several years afterwards:—*Held*, that under the above section, the legal estate passed immediately on the allotment being made, and before the award was executed.

**T**HIS was an action of ejectment tried before *Williams, J.* at the *Oxford* Summer Assizes, 1835, when a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court upon the following case.

Two demises were stated in the declaration by *Congreve Harris*; one on the 1st *January*, 1829, and the other on the 1st *January*, 1835. The lessor of the plaintiff claimed the premises in question, which consisted of ten acres and three roods of land, situated in the hamlet of *Chadlington West*, and in the parish of *Charlbury*, as mortgagee in fee of one *Jonah Smith*, under deeds of lease and release, of the 17th and 18th *December*, 1824, between the said *Jonah Smith* and *Mary* his wife, of the one part, and the said *Congreve Harris*, the lessor of the plaintiff, of the other part. These deeds were in the ordinary form, and granted, released, and confirmed, unto the said *Congreve Harris* (*inter alia*), “a messuage and building, lands and premises, by the open field description being half-a-yard land, late *Daniel Smith's*, and all such allotment or allotments, pieces or parcels of land or ground and premises, which the commissioners, acting under or by virtue of an act of parliament made and passed in the 51st year of the reign of his late Majesty King *George* the Third, intituled, ‘An Act for inclosing certain lands in the hamlets of *Chadlington West*, *Chadlington East*, and *Chilson*, in the parish of *Charlbury*, in the county of *Oxford*,’ had set out, or should set out, allot and award, in lieu of and satisfaction for the open field lands, grounds and right of common of the estate of the said *Jonah Smith*, called late *Daniel Smith's*, consisting of half-a-yard land in *Chadlington* aforesaid, and each of them, and every part thereof.” The usual provisions for redemption, &c. followed. The commissioners under the above recited act duly made their award on the 2d *July*, 1825, and they thereby did set out and allot, and did thereby award unto and for the said *Jonah Smith*, in lieu of and satisfaction for the open field lands, grounds, and right of common of his estate, called late *Daniel Smith's*, consisting of half-a-yard land, the allotment next therein described, that is to say, one plot or parcel of land or ground, situate in the hamlet of *Chadlington West*, at *Crooked Oaks Furlong*, containing ten acres and two roods, bounded by the *Chipping Norton* road, by the second allotment to said *Jonah Smith*, and by the 21st allotment to Sir *Edwin Bayntun Sandys*; the boundary fences of the last described allotment are against the *Chipping Norton* road, and against the second allotment of the said *Jonah Smith*. The premises sought to be recovered in this action, were the ten acres and two roods of land allotted by the commissioners as above; and it appeared that the whole of the title-deeds relating to the property, were placed in the hands of the solicitor of *Congreve Harris*, at the time of the execution of the mortgage-deeds in *December*, 1824, and had continued uninterruptedly in the possession of the said solicitor, or of Mr. *Harris*, ever since.

The defendant claimed to be a prior mortgagee, under indenture of mortgage of the 21st *November*, 1818, whereby the said *Jonah Smith* granted and demised for 500 years unto *Samuel Saunder* (the defendant) his executors,

administrators, and assigns (*inter alia*)—"One plot or parcel of land or ground, being one of the allotments in lieu of half-a-yard land, late *Daniel Smith's*, purchased by said *Jonah Smith* of one *John Smith*, situate in the said hamlet of *Chadlington West*, at *Crooked Oak Furlong*, containing ten acres two roods, &c." This description of the allotments was the same as one which had been delivered to *Jonah Smith* by authority of the commissioners in 1817, and which was afterwards inserted in the award, as it is above set out. That description shewed these lands to be those sought to be recovered in the present action. The defendant also proved indentures of lease and release of 28th and 29th December, 1826, between the said *Jonah Smith* of the first part, the said *Samuel Saunder* of the second part, and one *Edward Vere Holloway* of the third part; which recited the indenture of mortgage of November, 1818, and that doubts had been entertained with respect to the validity of the said indenture of November, 1818, and whether the said *Jonah Smith* was, at the time of the execution thereof, seised of the fee simple of said hereditaments and premises thereby demised, by reason that the commissioners under the said Act of Parliament for inclosing the open and common fields of *Chadlington* aforesaid, had not then signed their award; and it then ratified and confirmed the premises to *Samuel Saunder*, his executors, &c. The commissioners set out the allotments, and among other proprietors put *Jonah Smith* in possession of this allotment of ten acres and two roods, in the year 1812, and he remained in possession until his death in 1827, since which time to the present, his wife *Mary* and the defendant in this action, had been successively in possession. The question for the consideration of the Court is, whether under all the above circumstances, the lessor of the plaintiff is entitled to recover the premises in question. If the Court should be of that opinion, then the verdict is to stand; if they should be of a contrary opinion, then a verdict is to be entered for the defendant.

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*W. J. Alexander*, for the lessor of the plaintiff.—By the words of the 46th section of the Inclosure Act, 51 G. 3, c. xxv, referred to in the case, coupled with the 34th clause (a), the lessor of the plaintiff contends that the legal

(a) The following were the clauses of the act referred to in argument:—

34th. And be it further enacted, That the said commissioners shall, and they are hereby authorised and required to set out, divide and allot, all the residue and remainder of the lands and grounds hereby directed to be divided, allotted, and inclosed, unto and amongst the several proprietors thereof, and persons interested therein, in proportion and according to their several and respective lands, grounds, rights of common, and other rights and interests into and over the same.

43rd. And be it further enacted, That if any person hath sold, or shall at any time before the execution of the award of the said commissioners, sell his, her, or their interest, right, title, or property, in, over and upon the said open fields, common pasture, common meadows, down, and other commonable lands and waste grounds, or any part thereof, to any person or persons whomsoever, then and in every such case it shall be lawful for the said commissioners, and they are hereby au-

thorized and required, with the consent in writing of such vendor or vendors respectively, to make an allotment or allotments of the land unto the vendee or purchaser in such sale, or to his or her heirs or assigns, for or in respect of such right, interest, and property so sold as aforesaid, and every such vendee or purchaser, and his or their heirs and assigns, shall and may, from and after the execution of the said award, hold and enjoy the lands so to be allotted to her, him, or them, as aforesaid, in the same manner to all intents and purposes, as the vendors in every such sale might, could, or ought to have held or enjoyed the same, in case such sale had not been made.

46th. And be it further enacted, That the several lands and grounds so to be allotted and awarded upon the said division and inclosure to the several persons concerned, and the several messuages, lands, tenements, old inclosures, new allotments, and other hereditaments which shall be exchanged in pursuance of this act, or the said recited act, (The Ge-

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estate in the allotments does not vest until the award is finally made by the commissioners; and that it thence follows, that on the making of the award in *July*, 1825, the legal estate in the allotment now sought to be recovered, vested in the lessor of the plaintiff, in the same way that he then had the legal estate in the old tenements, in respect of which the allotment was made. He also contends, that the defendant, though a prior mortgagee of the allotments, yet not having taken possession of the title-deeds to the property, by which he enabled the mortgagors to commit a fraud, has an equitable interest only. The case of *Doe d. Sweeting v. Hellard (a)*, supports this view of the construction of the 46th section, to which the clause of the Act of Parliament set out in that case, is very similar. The judgment of Lord *Tenterden* in the case of *Farrer v. Billing (b)*, is a strong authority to the same effect. The case of *Kingsley v. Young (c)*, which may be cited as an authority on the other side, is entirely distinguishable; for in the act there under consideration, there was an express clause giving a power to sell and convey the allotments before the execution of the award. The judgment of Lord *Eldon*, in the second report of that case, is rather a confirmation of the construction now contended for. The case of *Lowndes v. Bray (d)*, is also to the same effect. *Cane v. Baldwin (e)*, may also be cited as bearing in some measure on the point. *Doe d. Dixon v. Willis (f)*, cannot be cited on the other side, as it does not appear from the report what the particular words of the clause of that Act of Parliament were, nor does the case of *Farrer v. Billing* appear to have been cited in argument. It is also said that the case of *Doe d. Dixon v. Willis* was overruled by Sir *John Leach* in 1833, in the case of *Mortlock v. Kentish*, which is not reported. If this construction of the Act 51 Geo. 3, c. xxv, namely, that the legal estate does not vest until the award of the commissioners is executed, be correct, then by the award in *July*, 1825, it was vested in the lessor of the plaintiff, who was mortgagee of the old tenements under the deeds of *December*, 1824. The cases of *Goodtitle d. Norris v. Morgan (g)*, and *Right d. Jefferys v. Bucknell (h)*, shew that it did not vest in the defendant under the prior mortgage deed of 1818, as the lessor of the plaintiff had all the title-deeds, and had no notice of the prior mortgage. The defendant also in this case stands in the place of his mortgagor, and comes within the general rule, that a mortgagor cannot dispute the title of his mortgagee.

*Cripps, contra*.—The words of the 46th section of this Inclosure Act are quite sufficient to vest the legal estate in the allotments immediately on the commissioners making them, so as to give the parties to whom they were

neral Inclosure Act, 41 G. 3, c. 109) immediately after such allotments and exchanges are made as aforesaid, shall be, remain, and enure to the several persons to whom the same shall be respectively allotted or given in exchange as aforesaid, who shall from thenceforth stand and be seised and possessed thereof, to such and the same uses, estates, trusts, and purposes, and subject to such and the same wills, settlements, limitations, powers, remainders, leases (except leases at rack rent) charges, and incumbrances, as the several and respective messuages, lands, tenements, old inclosures, or other hereditaments, in lieu of which such allotments or exchanged premises shall be respectively made or taken as

aforesaid, are now held under, subject to or liable to be charged with, or affected by, or might or would have been held under, or subject to or liable to have been charged with, or affected by, in case this act had not been made.

(a) 9 Barn. & Cres. 789; 4 Man. & Ryl. 736.

(b) 2 Barn. & Ald. 171.

(c) 17 Vcs. 468; 18 Ves. 207.

(d) 1 Sugd. Ven. & Pur. 342, 9th edit.

(e) 1 Stark. 65.

(f) 3 M. & Payne, 24; 5 Bing. 441.

(g) 1 Term Rep. 755.

(h) 2 Barn. & Adol. 278.

allotted, the right to dispose of them. The argument on the other side omits one material consideration; namely, that the mortgage to the lessor of the plaintiff was equally with the mortgage to the defendant, before the award made by the commissioners, and therefore the cases cited go to shew that the title of the lessor of the plaintiff is also bad, if the construction of the act contended for on the other side is valid. In 1811 the Inclosure Act was passed. *Jonah Smith*, under whom the defendant claims, was put in possession in 1812 of the allotment in question, as well as of another allotment. In 1817 the commissioners delivered to him a description of the two allotments, shortly after which, in 1818, he mortgaged this allotment to the defendant for a term of 500 years. The defendant therefore had then a clear legal term of 500 years. In 1821, the general act of 1 & 2 *Geo.* 4, c. 23, passed. By that act, even supposing that the legal estate was not vested in *Jonah Smith* by the local act on the allotment being made, the defendant would have been entitled to maintain an action of ejectment for this allotment, and consequently would have been able to defend one. That act was passed expressly to remedy the inconvenience of the decision come to in the case of *Farrer v. Billing* (a). Subsequently, in 1824, the mortgage in fee was made to the lessor of the plaintiff, and if the award afterwards in 1825 had any effect at all, it must have affected the prior title of the defendant rather than that of the lessor of the plaintiff. There were two allotments to *Jonah Smith*, and one only having been mortgaged to the defendant for a term of years, he would not have been entitled to the possession of the title-deeds, but merely to a covenant to produce them, of which the subsequent mortgagee could not have had notice given him. The case of *Goodtitle v. Morgan* (b), is overruled by that of *Bailey v. Fermor* (c).

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*W. J. Alexander*, in reply.—Had the intention of the legislature been to make the legal estate vest immediately on the allotments being set out, it would have been done by express words. The allotments were not in fact made until the award was executed, though in one sense they may be said to have been made when the commissioners put *Jonah Smith* in possession in 1812. *Farrer v. Billing* (a) is an authority to shew that they were not allotted until the award was executed. The general statute 1 & 2 *Geo.* 4, c. 23, affords a strong argument in favour of the lessor of the plaintiff, as the necessity for that enactment shews that previously, the defendant could not maintain an ejectment, and therefore had not the legal estate.

Lord DENMAN, C. J.—In this case the lessor of the plaintiff seeks to recover some property by proving a title under *Jonah Smith*, which title was made over to him in 1824. The defendant says he was already previously entitled under the 51 *Geo.* 3, c. 25, an act of parliament which directed the inclosure of certain lands. (His Lordship then read the 46th section.) This act having passed in the year 1811, an allotment was made in 1812 to *Jonah Smith* of the land now sought to be recovered, and in 1818 he conveyed that land to the defendant. Now, according to the terms of that clause, on the construction of which the whole of the case seems to me to rest, without admitting of a reference to the general act 1 & 2 *Geo.* 4, c. 23, it seems to me

(a) 2 B. & A. 171.  
 VOL. II.

(b) 1 T. R. 755.  
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(c) 9 Price, 262.

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that *Jonah Smith* had full power to mortgage this property to the defendant. He therefore proves a title in himself, and at the same time it is shewn that there is none in the plaintiff. There must therefore be judgment for the defendant.

PATTESON, J.—There has been a great deal of discussion which does not bear upon the case, though it was proper to be introduced, because it would so bear, if the construction that Mr. *Alexander* seeks to put on the 46th clause of the local act were the true construction. The question turns on that act alone. The language of Lord *Tenterden*, in the case of *Farrer v. Billing* (a), is, “The language of the local act upon which that case (*Kingsley v. Young*) arose, was different from that of the act under our present consideration. The legislature may certainly, by proper words, give the seisin and legal estate upon the allotment only, and before execution of the award. But we think the present act does not contain any words proper for that purpose, or indicative of such an intention.” Now, looking at the 46th section of this local act, it appears to me to contain proper words for that purpose, because the words are, “that the several lands and grounds, so to be allotted and awarded &c., immediately after such allotments and exchanges are made as aforesaid, shall be, remain, and enure, &c.”; and the obvious meaning is, immediately after the allotment is in point of fact made. It is contended, that it must mean when the allotment is made, possession given, and completed by the award. I think it means when the allotments are in point of fact originally made, at which time they shall enure to the person to whom they are allotted. If the act of parliament had stopped there, it might perhaps have been argued that it conveyed no *legal estate*, as it would be merely to remain and enure to them, giving them some interest; but it goes on to say “who shall from thenceforth stand and be seised and possessed thereof, to such and the same uses &c., as the several and respective messuages &c., in lieu of which such allotments or exchanged houses shall be respectively made or taken as aforesaid, are now held under &c.” I must take it that *Jonah Smith* was seised in fee of the olden property, and then it follows, that immediately after the allotment, by operation of the 46th section, he became seised in fee of the allotment. That was made in 1812, and he made the deed of mortgage to the defendant in 1818. I do not rely on the validity of that deed under the 1 & 2 *Geo. 4*, c. 23, because that act did not pass till 1821, but upon the 46th section of the local act. If he had the legal estate by virtue of that section, then his mortgage did convey the legal estate, and what happened afterwards, by the passing of the act 1 & 2 *Geo. 4*, c. 23, was immaterial.

WILLIAMS, J.—I am of the same opinion, that upon the construction of the 46th section of the local act alone, the question absolutely turns and depends. If, as is thrown out by Lord *Tenterden* (b), it is competent for the legislature to frame an act of parliament which shall have the effect of vesting at once the seisin and legal estate, upon the allotment being made; in my opinion that power has been exercised in framing the section to which reference is made. So far from the vesting of the legal estate being made to turn on the completion of the award, undoubtedly that section contemplates that as

(a) 2 B. & A. 178.

(b) Ibid.

to the several lands and grounds that were to be allotted, the parties in whose favour the exchange was made, were to stand and be seised to such *estates*, amongst the rest, as the several and respective messuages, &c., in lieu of which the allotments were made. Now, what was the estate that they had in old open lands, which the recital says were greatly inconvenient? These lands were held in fee simple; by the inclosure, others were substituted for them, and in that state of things there was a mortgage to the defendant.

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COLERIDGE, J.—The defendant has a prior title in point of time, and the only question was, whether *Jonah Smith* had the power to give him a legal estate. That depends on the construction of the 46th section of the local act. All the arguments and cases cited on the part of the plaintiff, seem to me equally favourable to the defendant. The words are, that the new lands, so to be allotted and awarded on the said inclosure, shall, *immediately after* such allotment, remain and enure to the several persons to whom they shall be allotted, and be settled to such and the same uses, &c. It is contended on the part of the plaintiff, that this must mean upon the allotment, when perfected by the award, being executed. Now, before referring to the cases cited, we must look to the construction of the clauses in this act of parliament; and we cannot turn to any section without seeing that the word “allotted” is used in a distinct sense to that of “awarded.” We find also the words “allotted and awarded,” which goes to shew that “allotted” is to be taken in the popular sense of allotment by the commissioners, in opposition to the complete sense as perfected by the award. If that be so, then in 1812, when the commissioners made the allotment, and *Jonah Smith* came into possession, at that moment he was seised in fee. Being so seised, he had good right, in 1818, to make this mortgage to the defendant. The case of *Doe v. Hellard (a)* bears as much in favour of the defendant as of the plaintiff. There must therefore be judgment for the defendant.

Judgment for the defendant.

(a) 9 B. & C. 789.

CANE v. CHAPMAN.

THIS was an action on the case, brought against the defendant as clerk to the commissioners for paving and lighting the town of *Harwich*, appointed under a Local Act, 59 G. 3, c. 118. The declaration stated, “that

1. In case against the clerk of certain commissioners under a local act, the declara-

tion stated, that the plaintiff advanced to the commissioners a sum of money for the purchase of an annuity, and that five of the commissioners, by a grant made according to the form of the statute, did by virtue of the act grant an annuity out of the rates granted and to arise by virtue of the act, and that afterwards a quarterly payment of the annuity became due, and that the commissioners had in their hands, out of the rates granted by the act, more than sufficient to pay it, and that it became their duty to pay it, but that they did not:—*Held*, 1st, that a plea, traversing the commissioners' duty to pay the quarterly payment, was bad on special demurrer:—2d, that it was not cause of general demurrer to the declaration that there was no averment that the money was advanced to the commissioners for the purposes of the act, or that there was no averment that the commissioners had sufficient to pay all demands on the rates.

2. The local act enacted, that the commissioners might sue and be sued in the name of their clerk, for or concerning any thing which shall be done by virtue or in pursuance of the act; and also by another section enacted, that no action should be brought for any thing done in pursuance of the act, until fourteen days' notice had been given to the clerk:—*Held*, that an action for the non-payment of the annuity was concerning a thing done in pursuance of the act, and was properly brought against the clerk, as the section authorising actions to be brought against the clerk, was not to be construed as limited to acts of malfeasance or misfeasance only.

3. *Scilicet*, it is not necessary that fourteen days' notice should be given of such an action. Per *Coleridge, J.*

4. Case for neglect of duty is the proper form of action, as an action of contract is not maintainable either against the five commissioners who granted the annuity, or the whole body, they not being personally liable, and the credit having been given to the rates.

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after the passing of the act, the plaintiff advanced to the commissioners a sum of money, not exceeding in the whole, together with all money then and theretofore advanced upon mortgage, 7000*l.* : viz. 1350*l.* for the purchase of an annuity, to be paid and payable during the natural life of the plaintiff, and thereupon, by a certain grant then made, according to the form of the said statute, *five of the commissioners*, appointed by and in pursuance of the said act, did, by virtue of the said act, at a certain meeting held pursuant thereto, in consideration of the sum of 1350*l.* advanced and paid to them by the plaintiff, grant unto the plaintiff, his executors, administrators, and assigns, one annuity or yearly sum of 140*l.* 8*s.* out of the rates granted and to arise by virtue of the said act, to be paid to the plaintiff, his executors, administrators, and assigns, by four equal quarterly payments in every year, during the natural life of the plaintiff, at or in the *Guildhall of Harwich* aforesaid; and that the first payment thereof should be made upon the 1st of *March* then next ensuing. And that after making the said grant, to wit, on the 1st day of *December*, in the year of our Lord 1834, a large sum of money, to wit, the sum of 35*l.* 2*s.* for one quarterly payment of the said annuity, became and was due and payable to the plaintiff; whereof the commissioners so appointed as aforesaid then had notice. And that before and at the time when the said last-mentioned quarterly payment became and was due and payable, the commissioners so appointed as aforesaid had received and then held and retained in their hands, out of the rates granted and arising by virtue of the said act, divers large sums of money, more than sufficient to pay and satisfy the said quarterly payment. And that the commissioners so appointed as aforesaid, were then requested, at and in the *Guildhall of Harwich* aforesaid, to pay the said quarterly payment, or cause the same to be paid to the plaintiff, and it thereupon became the duty of the said commissioners to pay the said quarterly payment, or cause the same to be paid to the plaintiff at or in the *Guildhall of Harwich* aforesaid." A breach was then stated by the non-payment of the quarterly payment. There were two other counts for non-payment of the two next quarterly payments.

The defendant pleaded, first, not guilty; second, that it was not the duty of the commissioners to pay or cause to be paid to the plaintiff the said several quarterly payments in the declaration mentioned, in manner and form &c.; with a conclusion to the country. To this second plea there was a special demurrer, setting out for cause of demurrer, that it was double and multifarious, seeking to put in issue all the facts stated in the declaration, which precede the assertion of the liability of the commissioners to pay the instalments of the annuity; and also, that the defendant thereby traversed and attempted to put in issue a mere inference of law resulting from the matters of fact. To this demurrer there was a joinder.

The Local Act provided, (section 5,) that all acts and proceedings relating to the execution of the act might be done by any five of the commissioners, except where a greater or less number were specially required. It gave power to five of the commissioners to borrow money on mortgage for the purposes of the act, upon the credit of the rates. Another section recited, that persons might be willing to lend money on annuities, on the credit of the rates, and enacted, "that it should be lawful for any person to contribute and pay to the commissioners for the purposes of this act, any sum of money not exceeding in the whole, together with the money to be advanced upon

mortgage as aforesaid, the sum of 7000*l.* for the absolute purchase of one or more annuities, which annuities should be payable and paid by the commissioners, out of the money to arise by or from the said rates." A form of grant was also given. It also enacted, (section 15,) that the commissioners might sue and be sued "for or concerning any thing which shall be done by virtue or in pursuance of this act, in the name of their clerk." It also enacted, that no action should be commenced against any person "for any thing done in pursuance of this act," until fourteen days' notice had been given to the clerk; limited the time for commencing actions to six months, and gave usual power to plead the general issue, &c.

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Cresswell, in support of the demurrer.—The second plea is undoubtedly double and multifarious, and seeks to put in issue a mere question of law, therefore objections will be taken on the other side to the declaration. It will be contended, that case is not the right form of action; and the question will be, whether or not it is the duty of the commissioners to pay annuities granted in this manner. Now, the act gives power to the commissioners to raise money by annuities, to be secured on the rates, and expressly directs that the annuities shall be paid by the commissioners out of the rates. That enactment enjoins a distinct duty on the commissioners. The case of *The Mayor of Lyme Regis v. Henley* (a), shews, that by accepting the office of commissioners, the duty attaches. The judgment of *Eyre*, B. in *Sutton v. Johnstone* (b), is applicable to this case; he says, "that every breach of a public duty, working wrong and loss to another, is an injury, and actionable." In *Comyns's Digest*, Action on the Case for Negligence (A 1), it is laid down that action on the case lies for negligence in a man's duty, though it be a non-feasance, as if by the negligence of a servant cattle perish.—[*Coleridge*, J. —Would not a *mandamus* lie in this case?]
—If the rates had not been raised, it would be necessary to apply for a *mandamus* to raise the rates, but in this declaration it is alleged that the commissioners have sufficient in their hands to pay this annuity, and therefore case is maintainable. This principle is adopted in *Keighley's* case (c), where it is laid down, that if a person is bound to repair a sea wall, and by his default all persons who hold lands in the district are charged, each of them may maintain an action on the case against him. In *Schinotti v. Bumsted* (d), an action on the case was held to be maintainable against the lottery commissioners for not adjudging a prize to a person intitled to it. Yet that was a case where it might be supposed an application should have been made for a *mandamus*. In *Lacon v. Hooper* (e) case was brought against the commissioners of customs for not making an order for the plaintiff to receive a premium to which he was entitled. In *Sprosley v. Evans* (f) it was held, that case would lie for non-payment of tolls, although debt was also maintainable; and the same point was discussed in the case of *Steinson v. Heath* (g), though it was not decided. It is, therefore, no objection that an action might be maintained in another form. It is, however, submitted also, that no action of contract could be maintained for this annuity. The other objection raised is, that the action ought to be against the commissioners and not against their clerk; but the 15th section of the act is very ex-

(a) 3 B. & Ad. 77, 5 Bing. 91, 3 M. & Payne, 278, 1 Bing. N. R. 222, 1 Scott, 29.

(b) 1 T. R. 509.

(c) 10 Co. Rep. 139.

(d) 6 T. R. 646.

(e) 6 T. R. 224.

(f) 1 Rol. Abr. Action on the Case, K. 2.

(g) 3 Lev. 400.

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tensive, and the granting this annuity is clearly *concerning* a thing done in pursuance of the act. The commissioners are here sued in their character of commissioners, not as individuals, and therefore their clerk is properly made the nominal defendant.

Ogle, contra.—The first question which it is necessary to argue is, whether the commissioners, as a body, are personally liable for annuities granted under the act, and it is submitted that they are not. The act directs that persons may contribute money for the purchase of annuities, which annuities shall be payable out of the money to arise from the rates. The form of the grant, also given in the act and set out in the declaration, granted the annuity out of the rates. The clause giving the commissioners power to raise money on mortgage, may also be referred to, as shewing the intention of the legislature, that the credit was to be given to the rates and not to the commissioners. The cases of *Horsley v. Bell* (a) and *Eaton v. Bell* (b), which are cases where commissioners were held personally liable, were decided entirely on the ground that the parties did not give credit to the particular undertaking, but to the commissioners themselves, and therefore are in favour of this argument, as here clearly the credit was given to the rates. The accountant has in fact a certain portion of the rates conveyed to him. If, then, the commissioners as a body are not personally liable, the next point to be considered is, whether an action could be maintained against the five commissioners who granted the annuity. The grant, as set out in the declaration, states that five of the commissioners did, by virtue of the act, grant the annuity out of the rates to arise by virtue of the act. There can then be no difficulty in framing a declaration in covenant or *assumpsit*, against the five commissioners on that grant. Having established those two positions, the questions as to the action being against the clerk, and as to the form of the action, are disposed of; for if an action of contract may be maintained against the five commissioners, it is clear that *case* against the clerk, who is the representative of the whole body, cannot. In the case of *Everett v. Couch* (c), it was held, that an action could not be maintained against a treasurer as the representative of a body of trustees, for an act done by only five of them, although those five formed a *quorum*. The case of *Schinotti v. Bumsted* (d) was decided on the particular words of the act then under consideration. But if the Court should be of opinion that an action is maintainable against the whole body of commissioners, still the questions, as to the clerk being the defendant, and as to the form of the action, are not determined by that opinion. It certainly must have been the intention of the legislature, that in actions brought against the clerk under section 15, he should have the benefit of the clause requiring fourteen days' notice to be given, and limiting the time within which the action must be commenced. And the cases of *Umpleby v. M'Lean* (e), *Waterhouse v. Keen* (f), and *Doe d. Abdy v. Stevens* (g), shew that a clause such as the limitation clause in this act, applies only to some act of misfeasance or malfeasance. Here there has been a mere omission of duty, and as the limitation clause must be taken together with, and determines the construction of the fifteenth section, this is therefore not a case where the clerk may be made defendant. There are also several objec-

(a) Ambler, 770.

(b) 5 B. & A. 34.

(c) 7 Taunt. 1.

(d) 6 T. R. 646.

(e) 1 B. & A. 43.

(f) 4 B. & C. 200.

(g) 3 B. & Ad. 299.

tions to be made to the form of the declaration. In the first place, it is not averred that the action was brought within the time limited by the act of parliament, nor that notice was given to the clerk. Neither is it averred that the money was advanced by the plaintiff for the purposes of the act. On referring to the clause giving the power to raise money on annuities, it appears that there ought to be such an averment to make either the commissioners or the clerk liable under the act. It ought also to be averred, that the commissioners had enough in their hands, not only to pay the demand of the plaintiff, but all the other demands for money advanced on the rates. The absence of such an averment is an attempt on the part of the plaintiff to gain a priority over other claimants. Lastly, as to the plea, it is submitted that it is not bad. It puts in issue the facts of the case, and the law as applicable to those facts is only an incidental question. The plea of not guilty only puts in issue the non-payment of the annuity, and if this plea is not to be allowed, how could it be shewn that the commissioners are not bound to pay the annuity. Their duty to pay is one entire point, and the defendant is entitled to traverse that allegation in the declaration.

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Cresswell, in reply.—(The Court having intimated that the plea was clearly bad.)—As to the action being properly brought against the clerk, it is argued, first, that the commissioners as a body are not personally liable, because no credit was given to them, but to the rates; it is next argued on the contrary, that the commissioners as a body are not liable, because there is an implied *assumpsit* by the five commissioners. The first position, that no credit was given to the commissioners, is right. By the act certain powers are given to the commissioners, and any five of them may do the necessary acts. When those five commissioners granted the annuity, they did it in the name of the whole body, and it cannot be called the grant of the five only. Now what is the object of the clause, enabling the commissioners to sue and be sued in the name of their clerk? One object is to enable a person so to sue the whole body, and were it not for this clause the plaintiff might have great difficulty in bringing his action. The limitation clause is quite a distinct clause, and is not so extensive in its language as the former, which cannot be restricted to acts done merely, but must extend to non-feasance as well. Moreover this action is concerning a thing done, namely, the grant of the annuity, by virtue or in pursuance of the act. The judgment of the Court, in the case of *Everett v. Cooch* (a), proceeds on the very ground that there the action could not be maintained against the whole body of trustees. This action is one that is maintainable against the whole body of commissioners. It cannot, however, be an action of contract, and must therefore be in case for the breach of their duty. The declaration sufficiently avows also that the money was advanced for the purposes of the act, and as to the point of attempting to gain a priority, it might have been shewn by way of plea, that there were prior claimants. At any rate, both those objections are grounds of special demurrer only.

Lord DENMAN, C. J.—The Court has already intimated a clear opinion that the plea cannot be maintained, because it puts in issue an inference of law, and no particular fact. There are then two objections substantially remaining to be considered; one, as to the nature of the action; and the other, as to the party against whom it is brought. The clause of the act of

(a) 7 Taunt. 1.

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parliament giving the power to grant an annuity, and requiring the commissioners, in raising the money, to grant the annuity in the form set out in the declaration, enacts. (His lordship here recited the clause.)

In the first place, the question is, whether the grant of the annuity is an act done within the act of parliament, so as to give the party a right to complain of the clerk, and to make him defendant. Now, the terms of that clause are, that the commissioners may sue or be sued "for or concerning any thing which shall be done by virtue or in pursuance of this act, in the name of their clerk." If this grant can be brought within those terms, then the clerk is properly sued. The strongest argument used to shew that it is not a matter within the clause in question, is grounded on the clause for the limitation of actions, where it is enacted, that no action shall be commenced against any person for any thing done in pursuance of that act, until fourteen days' notice have been given to the clerk. The argument is, that the clauses must be taken to be correlative, and that, as this is not a case in which the clerk could be sued by reason of the latter clause, therefore the clerk ought not to be sued under the former. But it seems to me, that in the enabling clause there is language which expressly distinguishes it from the limitation clause. By the latter clause the action to be brought is "for any thing done in pursuance of this act;" but by the former, the power to sue and be sued in the name of the clerk is given "*for or concerning any thing done* by virtue or in pursuance of this act." Now, this latter language is much more comprehensive. And it seems to me, that this grant is an act done by virtue of the act of parliament, on which the clerk may be sued; and the more obviously so, because the charge thereby made on the rates is also under the act of parliament. The five commissioners cannot be responsible at all, for they acted for the whole body of commissioners; and where they so act, it is in pursuance of the act of parliament, and any action concerning what they have done is to be brought against the clerk. It seems, therefore, to me, that here the clerk is the proper person to be made defendant, as the representative of the commissioners.

The next question is, whether the action is properly brought in *case*. Upon that I had at first a good deal of doubt, because the word "*grant*" in the instrument imports a contract, and whether that was with or without seal, an action of contract, it appeared to me, might have been maintained. But considering that the commissioners are not personally liable for what was done in execution of a public trust, it seems to me proper that the action should be brought against them as for a neglect of a public duty, which they certainly do neglect when they do not perform their engagement with the persons who have contributed their money. It seems to me, therefore, that these two objections are effectually answered, that the action is properly brought against the clerk, because it is concerning a thing done in pursuance of the act of parliament; and also, that the action is properly brought in *case*, because the commissioners are not personally liable, but are liable for a neglect of a public duty.

PATTESON, J.—I am of the same opinion. It seems to me, with respect to the first point; that this plea is a traverse of a mere inference of law; and that it does not put in issue the facts out of which the duty arises. For whether or not the duty does arise out of the facts, is a mere conclusion of law.

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As to the question, whether the clerk is the proper defendant, it seems to me that he is. This is not an action against the clerk as a real defendant in the action, nor does the act of parliament cause the clerk to be sued as a real defendant, so as to make him personally liable, as was decided in the case of *Wormwell v. Hailstone* (a). The act of parliament says, that the commissioners shall be sued in the name of their clerk; therefore they are the real defendants in this action: and it follows of course that there can be no action brought against them in the name of the clerk, except where they are liable as a body. Next, are the commissioners as a body liable to any action? I should agree, that if a contract were made by five of the commissioners, so as to bind them personally, [whether under seal or not, is immaterial,] then the whole body would not be liable to any action, because the action must be brought upon that contract, and as five only have made it, it follows of course that no action would lie against the whole body. But, inasmuch as I apprehend, that this is not a contract binding personally on the commissioners who signed it, as they only make a grant under the act of parliament, out of the rates, by which there is no agreement to pay at all events, but only to pay out of the rates, therefore those five are the mere instruments to make that grant, and as it then becomes the duty of the whole body of the commissioners to pay the annuity out of those rates, the action is properly brought against the clerk, provided the words of the section are sufficient to authorise it; and it seems to me that they are sufficient. I can clearly see the intention of the legislature that the commissioners should be sued in the name of their clerk, when any question arises out of the act of parliament. The words "*concerning* any thing done," are certainly different from those in the limitation clause. Now, is this concerning any thing done in pursuance of the act? The grant is a thing done in pursuance and by virtue of the act. Therefore an action brought for the money due to the party to whom the grant is made, is brought concerning something done under the act of parliament. The words which are in the limitation clause, "for any thing done," have certainly always been construed to be limited to some act done by a party, which he intended should be under the act, but which may turn out not to be warranted by that act of parliament. They have undoubtedly been so confined to acts done, and held not to apply to contracts; but I think that the other clause having the words "*concerning* any thing," shews that this action will lie against the clerk.

Then will case lie? It follows of course, that if the commissioners as a body are the persons answerable for the payment of this money, that the action must be an action upon the case, because *they* have made no contract. The *contract* is clearly not binding on the whole body personally, but if at all, upon the five only. I do not think it does bind those five, they could not be sued in an action of *assumpsit* nor of covenant, because there is no contract made by them either individually or collectively. An action on the case, therefore, is the only form in which the commissioners as a body can be sued, and that form has been followed here, stating their duty as a body, that they have received the money, and have not applied it to the plaintiff, as they were bound to do. The case has also been argued as a question of priority. We cannot enter into that question, it does not appear on the face of the record that there are any other claims. The plaintiff appearing as the

(a) 6 Bing. 668, 4 M. & Payne, 512.

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only creditor, and the commissioners having a sum of money, it is applicable to the payment of this debt only, as far as appears by this record. There must therefore be judgment for the plaintiff.

WILLIAMS, J.—I am of the same opinion. The plea is an attempt to put in issue an inference of law. I cannot at all see any difficulty in pleading in the way that has been suggested. If the commissioners had any defence, why should they not state it by way of plea? If there was a prior mortgage, why not state that? but nothing of the kind is suggested or appears. It has been urged that an application for a *mandamus* would have been the proper course. That might have been so if the commissioners had had no funds, but it stands an undisputed fact that they have funds more than sufficient to pay the plaintiff, therefore the necessity to grant a *mandamus* does not exist. Next, it has been contended that the five commissioners are solely liable. That is an assumption wholly contradicted by the facts of the case. By the 5th section of the act of parliament, five commissioners represent the whole body; and by the terms of the annuity grant they do not personally pledge themselves at all, but they grant out of the rates raised by virtue of the act of parliament. It seems to me, that within the 5th section, the whole body are liable. Then how is it that they are shewn to be liable? Why, by virtue of the allegation in the declaration, that they have funds in hand more than sufficient to pay the amount of the claim of the plaintiff. That decides the point, that case may be maintained for the breach of duty, arising from their neglect to pay out of the funds in their hands.

Then as to the other point, whether or not the clerk may be sued. The general language of the 15th section, upon which reliance was placed, and the words "for or concerning any thing done in pursuance of this act," seem to me sufficiently large to sustain this action against the clerk. It arises by reason of the grant of the annuity, and that was a thing done in pursuance of this act.

COLERIDGE, J.—I am of the same opinion. The argument in the early part of the case applied mostly to the question, whether there was any personal liability in the commissioners. Now, as far as this argument was directed to the consideration whether any action could be maintained at all, it seems to me inapplicable. Suppose some action might be brought, it does not follow at all that the defendant in that action would be personally liable. The distinction is clear between a judgment being recovered against a nominal defendant, and the execution resulting from that judgment. That point was considered in *Wormwell v. Hailstone* (a). That case turned on the provisions of an act of parliament, and the principle of it seems to me of importance in the consideration of the two next points; whether the action is properly brought against the commissioners in the name of their clerk, and whether it is brought in the proper form. Now, let us look at the circumstances of the case, and see the exact situation of the parties; the plaintiff has advanced a sum of money on an instrument purporting to be made by five commissioners under the provisions of the act of parliament, whereby they grant him an annuity. Now, if there be any personal liability at all, it can only be a personal liability in the five, it cannot be in the whole body of commissioners. Then if there is no personal liability in

(a) 6 Bing. 668, 4 M. & Payne, 512.

those five persons, and if they have only acted as commissioners, that circumstance will bear on these two questions. They say, that they have granted an annuity out of the rates, "granted and to arise by virtue of the act." That is the transaction, call it contract or what you please. What is that more than an acknowledgment of a receipt of money by them as commissioners acting by virtue of the act, and an undertaking to set aside so much of the rates then raised, or to be raised thereafter, for the purpose of paying this annuity? I think it would be the height of injustice to say, that their promising always to set aside certain rates to be applied to the discharge of this annuity, is to make them personally liable. Now, if they are not personally liable, let us see whether the commissioners are properly sued in the name of their clerk. The words of the act of parliament are as large as possible, and we ought not to restrain their effect. It is highly convenient that some ostensible person should sue or be sued, for or concerning any thing done in pursuance of the act. Surely here something has been done by virtue of the act. There has been a grant of an annuity, is not this therefore an action brought concerning a thing done in pursuance of the act of parliament? It seems to me that it is within both the words and the spirit of the clause.

The next point is, whether or not this is the proper form of action. What is the substance of the action? It is not brought to recover a loan of money to the commissioners, but for this annuity, and the substance of the action is, that, acting in a public capacity, they have set aside part of the rates as applicable to it. It seems to me, therefore, that the form of the action is right, and that the right party is made defendant.

The only remaining question is, whether the declaration presents objections which are grounds of general demurrer, as I am clear that no advantage can be taken of any thing that would not be available on general demurrer. The only things suggested are, first, with regard to the want of an averment of the action not being brought in time, or that notice was given. That objection was just mentioned, and almost immediately abandoned, and I think that the clause requiring that, does not extend to this case. Then it is said, that there is no averment that the money was advanced for the purposes of the act. If that omission had been assigned on special demurrer, I should have thought it fatal, and do not know, as at present advised, how the objection would have been got over. But it seems to me, that now, such objections only can be taken as are available on general demurrer. It is stated that these five commissioners did, by virtue of the act, grant the annuity. Now, by virtue of the act they could only grant the annuity in discharge of money so borrowed, I therefore think this objection is not available upon general demurrer. There is one point more, as to priority of payment. It is said, that the plaintiff ought not merely to have alleged that the commissioners had money enough in their hands to pay the demand of the plaintiff, but that he should have also stated all the demands on the rates. I do not think that necessary; and I also think that the point could not arise on general demurrer. It is alleged in the declaration that they held and retained in their hands, out of the rates, divers sums of money more than sufficient to pay and satisfy this quarterly payment, but that they did not pay it. I think that is sufficient, and therefore, upon all these grounds, the judgment must be for the plaintiff.

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Ogle then asked for leave to amend the plea, and to state what was the real fact, namely, that the commissioners had not sufficient money in their hands to pay the annuity, but was refused.

Judgment for the plaintiff.

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November 18th.

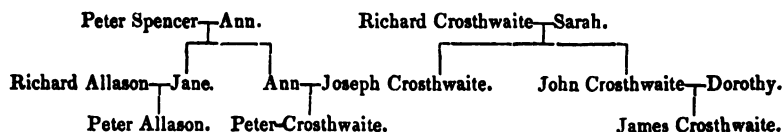
The son of one of two coparceners made partition by deeds of lease and release with the alienee of the other coparcener:—*Held*, that the son of the coparcener who made the partition had the same estate in the land as before, and took nothing as purchaser; and that therefore the descent *ex parte maternâ* was not broken.

THIS was an action of ejectment, tried before Lord Abinger, C. B. at the Summer Assizes, 1835, for the county of Cumberland, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—

The lessor of the plaintiff, *James Crosthwaite*, claims the property as heir *ex parte paternâ* of *Peter Crosthwaite* deceased; and the defendants' claim is as devisees of *Peter Allason*, who was heir-at-law *ex parte maternâ* of the said *Peter Crosthwaite*.

One *Peter Spencer* was formerly owner of an estate of which the property in question forms a part, and upon his death his estate descended to his two daughters, *Jane*, the wife of *Richard Allason*, and *Ann*, the wife of *Joseph Crosthwaite*, in coparceny. Upon the death of *Jane*, her estate in the premises descended to *Peter Allason*, her son and heir; and upon the death of *Ann*, her estate in the premises descended upon the said *Peter Crosthwaite*, her son and heir.

The following pedigree, which it is agreed is correct, shews the relative position of the different parties, and their title by descent:—



In 1810, *John Nicholson* purchased *Peter Allason's* share of the property, and the same was duly conveyed by *Peter Allason* to *John Nicholson* by indenture of lease and release, dated respectively the 15th and 16th November, 1810. The latter deed was made between *Peter Allason* of the one part, and *John Nicholson* of the other part, and the *habendum* was to *John Nicholson*, his heirs and assigns.

In 1816, *Peter Crosthwaite* and *John Nicholson* made partition of the property by indentures of lease and release, dated respectively the 15th and 16th of April, 1816. The latter deed was made between *Peter Crosthwaite* of the first part, *John Nicholson* of the second part, and *John Huddleston* of the third part; by it the whole of the property was released to *John Huddleston*, *habendum* as to one portion, being the premises sought to be recovered, to the use of *Peter Crosthwaite*, and, as to the remainder, to the use of *John Nicholson*.

Peter Crosthwaite from that time became and was sole seised thereof in fee, and died so seised in 1819, intestate. Upon his death *Peter Allason* entered into the premises in question, claiming to be entitled as heir *ex parte maternâ*, and continued possessed until the time of his death.

In 1831, *Peter Allason* died, having by his will, duly attested to pass real property, devised his estate and interest in the premises to the defendants.

John Huddleston, the other lessor of the plaintiff, is the releassee to uses mentioned in the deed of partition.

The question for the Court is, whether *James Crosthwaite*, being heir *ex parte paterná* of *Peter Crosthwaite*, is as such entitled to all or any part of the premises in question; or whether the defendants, as devisees of *Peter Allason*, who was heir-at-law of *Peter Crosthwaite*, *ex parte materná*, are entitled. If *James Crosthwaite* is entitled, the verdict is to be entered for all, or such proportion of the property as the Court may direct; if not, a nonsuit is to be entered.

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*Wightman*, for *James Crosthwaite*.—*Peter Crosthwaite*, by the deeds of lease and release with *John Nicholson*, whereby the partition was made, became entitled to his share of the estate by purchase, and consequently the descent *ex parte materná* was broken, and *James Crosthwaite*, who is heir *ex parte materná*, is entitled to the land. It is admitted, that if a person seised *ex parte paterná* makes a feoffment in fee to the use of himself and his heirs, the nature of the descent will not be changed. *Co. Litt.* 13, a; 2 *Rolle's Abr.* 780, Uses (D.) 4, 5; *Abbot v. Burton* (a), *Godbolt v. Freestone* (b). But this partition having been effected by deeds of lease and release, the case is different, and the nature of the descent will be changed. At any rate, *Peter Crosthwaite* must have acquired by purchase a moiety of the part conveyed to him by the deeds of 1816, to hold in severalty, and that moiety will therefore descend to his heir *ex parte paterná*.

*W. H. Watson, contra*.—The rule of law is, that if a person who takes by descent *ex parte materná*, makes a feoffment in fee to the use of himself and his heirs, that it will not have the effect of breaking the descent. That is laid down in the case of *Martin v. Strachan* (c). It is also submitted, that the effect of these deeds of lease and release, whereby the partition was effected, will not alter the nature of the estate. The only effect of these deeds will be as to the enjoyment of the estate. In *Comyns's Digest*, Parcener, (C 15), it is said, "Upon partition made, the occupation and descent, which before were in common, shall be several and distinct. But a coparcener, after partition, continues in the same privity of estate as before, for it does not convey or make any alteration of the estate. So parceners shall be in from the common ancestor as before, for the partition does not make any degree;" and *Saville*, page 113, is referred to. It has never been denied, that if partition is effected by writ, that it will not alter the descent of the property; but then it is said, that this having been by deeds of lease and release, that will make a difference. The cases as to the effect of partition in the revocation of a will bear on this point. In *Luther v. Kidby* (d), it was held, that partition having been effected by deed, and a fine levied in pursuance thereof, would not have the effect of revoking a will. *Risley v. Battinglass* (e), and *Swift v. Roberts* (f), also decide the

(a) 2 Salk. 590; 1 Com. Rep. 160; 11 Mod. 181.

(b) 3 Lev. 406.

(c) 5 Term Rep. 107, note; 2 Str. 1179; 1 Wils. 2, 66.

(d) Vin. Abr. *Devise*, R. 6, pl. 30, and 3 P. Wms. 170, note.

(e) T. Raym. 240.

(f) 3 Burr. 1490; Amb. 617; 1 W. Bla. 476.

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same point. The case of *Luther v. Kidby* is recognised by Lord Eldon in the case of *Harwood v. Oglander* (a), and by Lord Kenyon in *Goodtitle v. Otway* (b), although in the case of *Tickner v. Tickner* (c), a different decision seems to have been come to.

*Wightman*, in reply.—After the deeds whereby the partition was effected, *Peter Crosthwaite* held his part in severalty, which before he held in common with *John Nicholson*; he must therefore have acquired it by purchase from *John Nicholson*, and therefore it will descend to his heir *ex parte paternd*.

Cur. adv. vult. (d)

Lord DENMAN, C. J. afterwards (November 25th) gave judgment.—In this case one of two parceners alienated his moiety in fee, whereby the alienee and the remaining parcener became tenants in common. Afterwards, by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each of them took a moiety in severalty. The question is, whether by that deed the parcener took any thing as purchaser, so as to break the descent *ex parte maternd*, and to let in the heir *ex parte paternd* on the death of the parcener. It is admitted, that if the deed of partition had been between the parceners themselves, the descent would not be broken: but it is said, that inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase; and doubtless this would be so if any thing was taken from him, but we are of opinion that nothing was taken by the parcener from the alienee under the deed. The effect of it was only, that the parcener had by it a divided moiety in severalty, discharged from any right in the alienee, instead of an undivided moiety in common, but he had the same estate in the land as before. The consequence is, that a nonsuit must be entered.

(a) 6 Ves. 219, and 8 Ves. 128.

(b) 7 Term Rep. 416, 417; 1 Bos. & Pul.  
578, 669.(c) 1 Wils. 308, cited in *Parsons v. Free-*

man, 3 Atk. 741; Amb. 116.

(d) The case was argued before Lord Den-  
man, C. J., *Patteson, Williams, and Coleridge*,  
Jrs.

## THE KING v. JOHN MARSH.

November 21st.

1. A grand jury  
must not consist  
of more than 23  
persons.

2. More than  
23 having been  
sworn in, the  
Court refused to  
quash an indict-  
ment found by  
them after the  
defendant had  
removed it by  
*certiorari*, and  
had taken his trial  
on it, and been  
found guilty.

3. On a motion to quash an indictment, the Court refused to listen to an affidavit made by a grand jury-  
man as to what passed in the grand jury room.

THIS was a rule calling on the prosecutors to shew cause why this indictment should not be quashed. The indictment was found at the *Dover Sessions* on the 16th of *February* last. The defendant removed it into this Court by *certiorari*, and he was tried and found guilty at the last Summer Assizes at *Maidstone*. It appeared on this motion, by the affidavit of the person who was foreman of the grand jury, that twenty-eight persons were impanelled and sworn on the grand jury which found the indictment, and that twenty-five of them sat on the consideration of the bill, received the evidence, and voted on the bill. By the affidavit of another person in Court, it appeared there were twenty-eight sworn on the

grand jury, and by the affidavit of the town clerk, it appeared he had sworn in more than twenty-three, though he could not say exactly how many: that he swore in all who presented themselves, in order to avoid any suspicion of partiality, as it was known this indictment would be preferred, and as a good deal of excitement existed in the town on the subject. Thirty-one persons had been summoned on the grand jury, and the person who summoned them also made an affidavit that more than twenty-three were sworn in. On granting the rule *nisi*, the Court said that they could not listen to that part of the affidavits which mentioned what had occurred in the grand jury room, as it was a violation of the oath of the grand jurymen to reveal it<sup>(a)</sup>. It did not appear what was the form of the caption of the indictment.

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*Platt and Adolphus*, shewed cause.—There is no authority for saying that there may not be more than twenty-three persons sworn on a grand jury. The earliest authority on the subject to be found is in *Co. Lit.* 126 b, where it is said, that an indictment must be found by an inquest of twelve or more, which is not an authority to shew that more than twenty-three grand jurors would be irregular. In *2 Hale's Pleas of the Crown*, 154, is given the form of the summons under which the grand jury attend, and by that it appears that the sheriff is directed to summon twenty-four. It will be argued, that if there are more than twenty-three grand jurymen, twelve may be for the bill, and twelve against it; it is submitted, however, that that is immaterial, and that so long as twelve concur in finding a true bill, it is sufficient. In *2 Hale's Pleas of the Crown*, 161, it is said, if there be thirteen or more of the grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, it is a good presentment. In *Comyns's Digest*, Indictment (A), it is said, that an indictment is an accusation found by a proper jury of twelve men. So in *2 Hawkins's Pleas of the Crown*, ch. 25, s. 1, it appears an indictment is to be by the oaths of twelve men. In *4 Blackstone's Commentaries*, 306, it is said, "to find a true bill there must at least twelve of the jury agree." *Viner's Abridgment*, Indictment, H. 9, pl. 5, is to the same effect; and all these authorities merely shew that it is necessary that the indictment should be found by twelve at least. The only authority to shew that no more than twenty-three ought to be sworn in, is what is said by Lord Mansfield in *2 Burr.* 1088, and referred to in *Bacon's Abridgment*, *Juries*, A.; but that opinion seems to rest merely on the ground of inconvenience. Another ground for discharging this rule is, that this is not the proper form of application in order to take advantage of the objection, if it is one, and that it is now too late to move to quash the indictment. In *Viner's Abridgment*, Indictment, H. 7, pl. 2, it is intimated that an objection to some of the grand jurors as being outlaws should be pleaded. In *2 Hawkins's Pleas of the Crown*, ch. 25, s. 26, a strong doubt is expressed that such an objection cannot be taken after trial. In the same way this objection ought to have been pleaded in abatement. In this case the defendant, by removing the indictment by *certiorari*, and pleading to it, and taking his trial on it, has admitted that there is a good indictment in Court. *Dr. Sheridan's case* (b) may

(a) 31 Howel's State Trials, col. 543. (b) See *Sykes v. Dunbar*, 2 Selw. N. P. 1066, 7th ed.

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also be referred to, as shewing that such an objection should be taken at the trial. If the objection appears on the caption of the indictment, it is error in law; if it does not so appear, it is error in fact, and the defendant should bring a writ of error, instead of making the present application.

The *Attorney-General*, and *Channel*, *contrà*.—The Court will decide the question as to the limit of the number that can be sworn in on a grand jury on general principles, with a view to the consequences which would follow from more than twenty-three being sworn in. The Court will also look to what has been the universal practice on the subject.—[*Lord Denman*, C. J.—The Court does not doubt but that twenty-three is the proper and limited number of persons to be sworn on the grand jury; the swearing in such a number is matter of practice, distinctly recognised by all the authorities in the way in which undisputed matters of practice are always recognised, by universal and unquestioned adoption.]—Then, on the other point, it is submitted that the Court will quash the indictment for this defect. It has been stated that the defendant should plead this matter, but this indictment is in fact null and void, and the defendant ought not to have been tried at all on it. In 2 *Hawkins's Pleas of the Crown*, ch. 50, s. 3, it is laid down as a general principle, that even after judgment, if it is void, advantage may be taken of the special matter without writ of error. There can be no doubt but that the indictment would have been void if less than twelve persons had found it. In the case of *The King v. Dickenson* (a), the defendant was found guilty, but it afterwards appeared that the witnesses attended before the grand jury without having been sworn. *Bayley*, J. thought the objection came too late after conviction, and therefore sentenced the defendant, but reserved the point for the opinion of the judges. The judges recommended that a pardon should be applied for to the Crown, without deciding upon the validity of the objection. That case apparently shews, that although there may have been ground of error, yet the Court would, if possible, relieve a defendant on motion. So here, even though the defendant may maintain error, still it does not follow that the Court will not likewise grant him relief on the present motion.

Lord DENMAN, C. J.—There has been no authority cited to shew that the Court is bound to quash the indictment in consequence of this mistake. The mistake may be in the caption of the indictment to which the party pleaded, and to which he has therefore had an opportunity of objecting. It is possible that he may not have been aware of the number of grand jurors sworn in; but still, if the caption is wrong, error in law would lie. If, on the other hand, the error does not appear on the caption, the defendant may bring it forward by error in fact. We do not feel bound to say whether either of these courses can be adopted in this case. Supposing that there is ground for arrest of judgment, that is also a proceeding open to him to adopt; but in the absence of all authority requiring us to quash the indictment, the party applying having brought it here by *certiorari*, and pleaded, and gone to trial, I think that we are not now called upon to make this rule absolute.

(a) Russ. & Ry. Cr. Cases, 401.

PATTESON, J.—We ought really to have some express authority to shew that we can quash an indictment for this cause after plea pleaded, and the defendant has taken his trial thereon, and has been found guilty. Whether he can bring error will depend on the record, which must be inspected before that can be determined.

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WILLIAMS, J.—We ought not to interfere when a man, who might have been aware of an objection, has pleaded generally, and has taken advantage of a trial, with the chance of an acquittal.

COLERIDGE, J. concurred.

Rule discharged (a).

(a) See this case again, 1 Will. Wol. & Dav. 150; and also *The King v. Davis*, 1 Car. & Payne, 470; *Scarlett's case*, 12 Co. Rep. 98.

### LORD BOLTON v. OTTIWELL TOMLIN, and others, Executors of JOHN TOMLIN.

November 21st.

THIS was an action of *assumpsit* tried before *Parke, B.* at the *Yorkshire Spring Assizes, 1835*. The action was for non-payment of rent, and for not cultivating a farm according to the special terms of the agreement hereinafter mentioned. The defendant pleaded *non assumpsit*, together with several special pleas. At the trial it appeared, that the farm in question was held by *John Tomlin's* father, as tenant to *Lord Bolton*, until *Lady-day 1820*, and that at the end of the year 1819, it was let to *John Tomlin* himself, in the following manner, which was the method usually adopted with *Lord Bolton's* property. *Lord Bolton* had printed rules and regulations under which his tenants held. Some alterations in writing were made in one of the copies of these rules and regulations, with the consent of *John Tomlin*. *John Tomlin* was then called into a room (in his turn with the other tenants), where were present *Mr. Sadler*, *Lord Bolton's* agent, and *Mr. Lupton Topham* his attorney. The attorney then said, "Mr. *Sadler*, have you agreed to let this farm to Mr. *John Tomlin*? and Mr. *John Tomlin*, have you agreed to take this farm upon the terms mentioned in these rules and regulations?" Having received the assent of both parties, the attorney then put his name to a memorandum indorsed at the back of the copy of the rules and regulations. The following is a copy of this memorandum:—

16th December, 1819.

"Memorandum—*William Sadler* of *Wensley*, in the county of *York*, gentleman, as agent for and on the behalf of the Right Honourable *Lord Bolton*, agreed to let to *John Tomlin*, of *Thornton Steward*, in the said county of *York*, farmer, and the said *John Tomlin* agreed to take of the same *William Sadler*, as such agent as aforesaid, all that farm called the *Thornton Steward Farm*, situated within the parish of *Thornton Steward* aforesaid, and containing by estimation 374 acres and 18 perches, be the same more or less, with the appurtenances, for the term of one year, and so from year to year until one of the said parties shall give to the other due notice to quit, at and under the

1. The defendant's testator agreed by parol with the plaintiff's steward to hire some land from year to year, upon the special terms mentioned in some printed rules, and to commence occupation at a future day; the plaintiff's attorney then signed a memorandum of the hiring at the back of the printed rules:—*Held*, that after a tenancy was actually created by entry and payment of rent, that this copy of the printed rules, and the memorandum indorsed, might be read by the attorney who signed it, in order to refresh his memory as to the special terms under which the land was hired, although there might perhaps have been, in the first instance, merely an agreement for a lease which was not to be performed within a year, and was therefore

bad by the fourth section of the Statute of Frauds.

2. A parol lease for a term not exceeding three years, warranted by the second section of the Statute of Frauds, may be as special in its terms as a written one.

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yearly rent of 754*l.*, to be paid in equal half-yearly payments; that is to say, on the 25th day of *March*, and the 29th day of *September*, in each year, *subject to the within printed regulations and conditions.*

"In the presence of me, LUPTON TOPHAM."

Amongst the rules and regulations there was one for sowing the land with clover seed, under particular circumstances, and for leaving the same unbroken up for two years. There was another for keeping certain lands uneaten and free from stock, for fifteen months previous to leaving the farm. At the time this memorandum was signed, it was also agreed by the parties that the tenancy was to commence at the following *Lady-day*. John Tomlin accordingly began to occupy the farm under this arrangement, at *Lady-day*, 1820, and continued to occupy and pay the rent until his death in *June*, 1821. His executors then entered and occupied the farm without any new agreement, and it was during their occupancy that the causes of action accrued. During the occupation by the executors, they made application to Lord Bolton's steward to be allowed to deviate from some of the rules. At the trial, Lupton Topham was examined, and produced the copy of the rules with his memorandum indorsed, and stamped with a lease stamp. It was then objected that the agreement was one which ought to be signed by John Tomlin, the party to be charged therewith, according to the Statute of Frauds, 29 *Car. 2*, c. 3, and that the copy of the rules and regulations, with the memorandum indorsed on it and signed by Lupton Topham, could not be received in evidence. Parke, B. overruled the objections, and allowed the rules and memorandum to be read to the jury; but gave the defendant leave to move to enter a nonsuit. A verdict was then found for the plaintiff, subject to a reference to arbitration. A rule having been obtained to enter a nonsuit according to the leave reserved,

*R. Alexander and J. Addison*, shewed cause.—One objection made to the evidence given in this case is, that the agreement between the parties was not a good demise, as it was not signed by the parties according to the provisions of the Statute of Frauds, 29 *Car. 2*, c. 3, s. 1. It was, however, a demise for a less term than three years, and is therefore within the exception of the second section of that statute. But it may be said, that it could not be a present demise, as the term thereby created was not to commence immediately, but at the following *Lady-day*. The case of *Ryley v. Hicks* (a), however affords an answer to that objection. That case is cited in *Selwyn's Nisi Prius* (b), where it is also said, "In *Inman v. Stamp*, B. R. *Trin. 55 Geo. 3*, *Dampier, J.* said, the practice had been with the foregoing case of *Ryley v. Hicks*, although he rather inclined to think that the second section of this statute, taken with the fourth, was confined to leases executed by possession, on which two thirds of the improved rent was reserved." (c) That is certainly an authority the other way; but there is a note in *Williams Saunders Reports* (d) which also seems to warrant the opinion that this was a good immediate demise, so as to bind Tomlin. It is further contended, on the other side, that this was merely an agreement for a lease, and not to be performed

(a) 1 Str. 651.

(b) P. 821, 7th edit.; p. 831, 8th edit.

(c) See the report of this case, 1 Stark. 12.

(d) Vol. i. p. 650, foot note to the case of *Took v. Glascock*,

within a year, and that it was therefore bad under the fourth section of the Statute of Frauds, as it was not signed by *Tomlin*, the party to be charged therewith. The case of *Bracegirdle v. Heald* (a) will be relied on, but is distinguishable, since here there was not merely an agreement for a lease, but an actual lease giving a present interest, which was complete when the parties assented by word of mouth to let and to take the land. The memorandum signed by Lord *Bolton's* attorney, and the copy of the rules and regulations, were not given in evidence as the agreement between the parties, but were merely memorandums for the use of Lord *Bolton's* attorney, to enable him to give evidence of the terms of the letting. This case is similar to that of *Rex v. St. Martin's, Leicester* (b), where a witness was allowed to look at a written entry to refresh his memory, the entry itself not being considered either as a lease or as an agreement for one. The case of *Rex v. The Inhabitants of Wrangle* (c), is also similar; and as in that case, so also in this, what the attorney did had not the effect of making the memorandum an agreement in writing between the parties. But even supposing there to have been an agreement, which was bad by the Statute of Frauds, still, *Tomlin* having entered on the land and occupied it, the terms of the holding are binding between the parties; *Doe v. Bell* (d), *Richardson v. Gifford* (e). It cannot therefore be contended, that in this case the defendants hold on those terms only which necessarily arise between landlord and tenant. It is clear that the rent has been paid in pursuance of the agreement, and the defendants have recognised the rules by applying to be allowed to deviate from them.

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*Cresswell and Wightman, contra*.—The material question in this case is, whether there was an absolute lease of the land, or merely an agreement for a lease; if the latter, it was within the fourth section of the Statute of Frauds. And there could not have been a present demise, for no present interest passed; *Doe v. Walker* (f). Being therefore merely an agreement for a lease, the case of *Tay v. Smyth* (g) shews that the tenancy would have endured for two years, and therefore the agreement, not being to be performed within a year, is within the fourth section of the Statute of Frauds. The covenants to sow the land with clover-seed, and to leave it unbroken up for two years, and to keep certain land free from stock for fifteen months, also shew that this was not an agreement to be performed within a year. The circumstance that the agreement has been partially fulfilled by the tenancy having commenced is immaterial; *Baydell v. Drummond* (h). The special terms of the agreement cannot therefore be taken to be those under which this land was held. And the plaintiff not having proved such an agreement as is required by the fourth section of the Statute of Frauds, is not entitled to recover for any breaches of a contract other than what would necessarily arise from the relation of landlord and tenant. *Bracegirdle v. Heald* (a) is an express authority for the defendants. In *Ryley v. Hicks* (i), there was clearly a lease, and not merely an agreement for one, and besides, the case of *Inman v. Stamp* (k), is an authority equally good for the defendants.

(a) 1 B. &amp; A. 722.

(b) 2 Ad. &amp; El. 210.

(c) 2 Ad. &amp; El. 514.

(d) 5 T. R. 471.

(e) 1 Ad. &amp; El. 53.

(f) 5 Barn. &amp; Cress. 111.

(g) Plow. 269—273.

(h) 11 East, 142.

(i) 1 Str. 651.

(k) 1 Stark. 12.



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In the cases of *Rex v. St. Martin's, Leicester* (a), and *Rex v. Wrangle* (b), it is clear that the writings were mere memorandums, and that the witnesses were entitled to read them to refresh their memories; but in the present case, the rules and memorandum were not used for that purpose merely, but were read to the jury as the agreement between the parties.

Cur. adv. vult. (c)

LORD DENMAN, C. J. afterwards (*November 25th*) gave judgment.—This was a special action of *assumpsit* for breach of the terms of a parol lease. The defendants were executors of the lessee. The facts were, that in the month of *December*, 1819, the testator's father was tenant of the premises, his tenancy being to expire the following *Lady-day*. The plaintiff's attorney, in the month of *December*, proposed at a meeting of the parties to let the plaintiff's farms, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing to succeed his father at *Lady-day*; but signed no writing. He did then enter, and continued tenant till his death; since which the defendants (his executors) have occupied and paid rent. At the foot of the printed paper of terms, was written a memorandum, not signed by either party, but by the attorney of the plaintiff. This memorandum commenced in the following terms:—"A. B., as agent of the plaintiff, agreed to let, and C. D. agreed to take," and went on to describe the farm, state the rent, and when it was payable; that the term was for one year, and so from year to year, until a due notice to quit should be given. The plaintiff had a verdict, with liberty to the defendant to move for a nonsuit. It is contended on behalf of the plaintiff, that the testator became tenant at all events on his entry at *Lady-day*, 1820, if not before; and that the memorandum might properly be adverted to for the purpose of shewing the terms of the tenancy, although not to shew any agreement to become tenant. On the other hand, it is contended that this was an agreement not to be performed within a year, and so by the fourth section of the Statute of Frauds required to be in writing and signed; and that although a tenancy from year to year may have been created, yet that the terms of it could be only such as result by law from the mere relation of landlord and tenant, there being no writing to satisfy the statute. Now, assuming that what passed in the month of *December* did not amount to a demise (see *Inman v. Stamp* (d) and *Edge v. Stafford* (e),) and that whilst it remained an executory agreement, the performance of it could not be enforced; yet it by no means follows, that when an actual demise by parol took place, which was valid under the second section of the statute, and a tenancy was actually created by entry and payment of rent, the terms of that tenancy may not be proved by parol. Leases not exceeding three years have always been considered as excepted, by the second section, from the operation of the first; and it seems absurd to say, that a parol lease shall be good, and yet that it cannot contain any special stipulations or agreements. No autho-

(a) 2 Ad. &amp; El. 210.

(b) 2 Ad. &amp; El. 514.

(c) The case was argued before Lord Den-

man, C. J. Patteson, Williams, and Coleridge, Js.

(d) 1 Stark. 12.

(e) 1 Cr. &amp; J. 391.

ity is, or can be cited, to shew that it may not; on the contrary, it has always been assumed, that a parol lease warranted by the second section, may be as special in its terms as a written one, and we are of opinion that such is the law. But it is contended, that in this view of the case the memorandum could only be used to refresh the memory of a witness; and perhaps that may be so. We cannot find that it was used substantially in any other manner; certainly it was not treated as being in itself a binding instrument; and whether in fact it was read by the officer of the Court, or by the witness, is immaterial, no objection on that ground having been taken at the trial. We are therefore of opinion that the verdict is right, and that this rule to enter a nonsuit must be discharged.

Rule discharged.

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### The KING v. The Inhabitants of the Parish of EASTINGTON.

**I**NDICTMENT for non-repair of a road leading from *Eastington* to *Sandholme*, in the East Riding of the county of *York*. *Plea*, that within the parish of *Eastington* there now is, and from time whereof &c. there hath been, a certain township called the township of *Eastington*, wherein there now are and immemorially have been divers inhabitants, and that the said part of the said highway, in the said indictment specified, is within the township aforesaid; and that the inhabitants of the said township, from time whereof &c., have repaired and amended &c. all the common highways within the said township that would be otherwise repairable by the inhabitants of the said parish at large, and that the inhabitants of the said parish at large have not, during all or any part of the time aforesaid, repaired and amended, and have not been used or accustomed to repair or amend, and of right ought not to repair or amend the common highways within the said township, or any of them; and that by reason of the premises the inhabitants of the said township ought to have repaired and amended, and still ought to repair and amend the part of the said highway in the said indictment specified, and thereby alleged to be out of repair, when and so often as it hath been and shall be necessary; and that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same. *Replication*, traversing the custom, whereupon issue was joined. At the trial before *Alderson*, B. at the *Yorkshire Spring Assizes*, 1835, a verdict was found for the defendants. Afterwards a rule was obtained to shew cause why judgment should not be entered for the Crown *non obstante veredicto*, or why judgment should not be arrested.

*Cresswell*, and *R. Alexander*, now shewed cause.—Judgment *non obstante veredicto* cannot be given unless the Court sees clearly that on the whole record that the prosecutor ought to have succeeded (a). Now the jury have found

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1. A plea to an indictment against a parish for non-repair of a road, must point out distinctly the persons bound to repair.

2. A plea that a road is in a particular township, and that the inhabitants of the township have been used, &c. to repair all roads within it which otherwise would be repairable by the parish at large, and that by reason of the premises the inhabitants of the township ought to repair the road, is bad for not averring that the road, but for the alleged custom, would be repairable by the parish.

3. A verdict having been given for the defendants on such a plea, a judgment *non obstante veredicto* cannot be given for the Crown, as it does not appear that the parish is liable to repair.

(a) 2 Wms. Saund. 319 c. note (c).

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that the parish is not liable to repair the road, and that the township is; it is impossible therefore to say that on this record the crown can be entitled to judgment. The objection to the plea on which is grounded the motion to arrest the judgment is, that it does not aver that this road, but for the alleged custom, would be repairable by the parish at large. Such an averment was inserted in the plea in the case of *Rex v. Ecclesfield* (a), but it does not appear to be necessary. It is sufficient to aver that the inhabitants of the township ought to repair by reason of the custom which is alleged, and that the inhabitants of the parish ought not. The latter are *prima facie* liable to repair, and that fact is alleged by the indictment itself. In the form of plea given in 2 *Williams Saunders*, 159 c, n. 10, there is no averment similar to the one which it is contended ought to have been inserted in this plea. Lord *Ellenborough* also, in giving judgment in the case of *Rex v. Ecclesfield*, makes no allusion to that averment, and the inference to be drawn from that circumstance may fairly be, that it did not appear to his mind a material averment.

*Starkie, contra*.—It is quite clear that when a parish is indicted for non-repair of a road, it is not sufficient to plead that they are not liable, but it must also be shewn distinctly who is. That has been decided in the cases of *Rex v. Yarnton* (b), and *Rex v. St. Andrew's, Holborn* (c); and the principle to be deduced from those cases is, that if it is not pointed out distinctly who is liable, the Court will not allow judgment to be given for the defendants. That is not done by this plea for want of the allegation, that, but for the custom, the parish would have been liable to repair, and such allegation cannot be supplied from the indictment. The presumption of law that a parish is liable to repair a highway can only be made against the parish, but not in its favour. Suppose a case where there are three descriptions of roads in a township, one repairable *ratione tenuræ*, another by a division of the township, and the third by the township at large. In such a case the parish must succeed on a plea like the present, and yet no liability would be fixed either on the individual or on the township.

LORD DENMAN, C. J.—It is quite clear that the first branch of this rule cannot be granted. As to the other I was at first much struck with the argument on the part of the defendants, but I think that it has been answered. The parish, to get rid of their common law liability, must shew pointedly and distinctly who are the persons liable to repair. This plea does not do that, and therefore the finding on it does not afford any legal defence to the indictment.

PATTESON, J.—I think that this objection to a plea in a criminal case is fatal. In civil proceedings it might perhaps have been a ground for special demurrer only.

(a) 1 Barn. & Ald. 348.

(b) 1 Sid. 140; 1 Keb. 277, 498, 514; 183.  
 3 Salk. 392.

(c) 1 Mod. 112; 3 Keb. 301; 3 Salk.

COLERIDGE, J.—The plea sets up a special defence, but does not apply that special defence to the particular case.

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WILLIAMS, J. concurred.

Rule absolute for arresting the judgment.

### The KING v. JOWL.

November 8th.

**W**IGHTMAN, on the part of the defendant, applied for a *certiorari*, to remove an indictment for obstructing a highway from the *Salford* Sessions. The place which it was alleged was a highway, and which the defendant had obstructed, had been inclosed and in the possession of the defendant above thirty years, who had built a brewhouse on it. It was suggested as probable that, after so long a non-user of the way, several difficult questions of law might arise on the trial of the indictment, and this was submitted as sufficient cause for granting the rule. It was also stated that it would be a great hardship on the defendant, after the undisputed enjoyment of the property for such a length of time, if those questions were improperly decided, and that the short delay that would take place by removing the indictment would be immaterial, as the place had so long not been used as a high road. *Rex v. The Marquis of Downshire (a)*, was referred to as shewing the difficult points of law which might arise on the trial of such an indictment.

The Court will not grant a *certiorari* to remove an indictment for obstructing a highway, unless some particular difficulty is specified as likely to arise on the trial.

*Per Curiam (b)*.—It seems to us that there is no great difficulty in this case; it is a mere question of fact whether the place is a highway or not. Some particular difficulty in point of law must be shewn to be likely to arise as a ground for granting this motion. We have perhaps been rather too lax in allowing indictments to be removed into this Court.

Rule refused.

(a) 1 Har. & Wol. 673.

(b) *Patteson, Williams, and Coleridge, Js.*

### The KING v. The Inhabitants of the Parish of ABERGELE.

November 24th.

**T**HE Quarter Sessions for the county of *Denbigh* commenced on the 5th of *April* last. On the 7th the Court heard a parish appeal against an order of removal, and quashed the order. Notice of an intention to apply for a *certiorari* to remove this order of the justices was given. On the 3d of *October*, application was made at the chambers of Lord *Denman*, C. J. for a *certiorari*, and he being out of town, his clerk forwarded the application to him. On the 8th, the *certiorari* was received in town from him. The recog-

1: A recognisance entered into by only two of the inhabitants of a parish, on removing by *certiorari* an order of justices in a parish appeal, is not sufficient, according to the provision of 5 G. 2, c. 19, s. 2.

2. A *certiorari* to remove an order of justices applied for before, but not obtained till after the expiration of six months after the order was made, is in time.

3. The recognisance being insufficient, the Court sent the writ down again to be allowed; on a proper recognisance being entered into:

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nisance required by 5 *Geo. 2*, c. 19, s. 2, on allowing the *certiorari*, was entered into by two inhabitants of the respondent parish, who were not the parish officers. A rule having been obtained to shew cause why the *certiorari* should not be quashed, and the recognisance discharged;

*J. Jervis*, shewed cause.—One objection to this *certiorari* is, that it was not applied for within the six months after the order of justices was made, as is required by the statute 13 *Geo. 2*, c. 18, s. 5; but it is clear that it was “applied for,” which are the words of the statute, on the 3rd of October, which was within the six months, and it is immaterial that the *certiorari* was not obtained until the 8th. Another objection is, that the statute 5 *Geo. 2*, c. 19, s. 2, requires the party prosecuting the *certiorari* to enter into a recognisance with sureties, to prosecute; and it is objected that the statute has not been complied with, as only two sureties have entered into the recognisance, but not the party prosecuting. In this case the prosecutor is the respondent parish in the appeal, and it is submitted that as it would be impossible for the whole parish to enter into the recognisance, it is therefore sufficient if two inhabitants enter into it. The case of *Rex v. Boughey* (a), is rather in favour of the objection made; but by a note of the judgment of Lord *Kenyon* in that case, which is in the possession of Mr. *Dealtry* of the Crown Office, it appears that what he intimated was, that where a parish was the prosecutor, it would be sufficient for two inhabitants to enter into the recognisance in the name of the whole parish, as in the case of an indictment where two inhabitants plead in the name of the whole. The invariable practice has been for two inhabitants, in such cases, to enter into the recognisance.

*Humfrey, contra*.—On the first point it is clear that this *certiorari* was not obtained within six months after the order of justices was made. The order must be considered as made on the 5th of April, when the sessions commenced. The more important point, however, is, that the express provisions of the statute 5 *Geo. 2*, c. 19, s. 2, have not been complied with. The parish officers ought, in this case, to have entered into the recognisances as the prosecutors, besides two other persons as sureties. The judgment of *Parke, J.* in *Rex v. The Justices of Cambridgeshire* (b), supports that construction of the statute.

Lord DENMAN, C. J. (c).—I think that Lord *Kenyon* took the correct view of the construction of the statute of 5 *Geo. 2*, c. 19, s. 2. The rest of the Court, however, think differently, and that the act requires two sureties, besides the party prosecuting, to enter into the recognisances. The consequences of another construction seem to me to afford a strong argument that Lord *Kenyon* was right. A different construction of the act cannot be complied with, unless all the parish officers enter into the recognisance. As to the other point, we think that the *certiorari* was applied for within the six months required by the 13 *Geo. 2*, c. 18, s. 5, and that the limitation of six months applies to the application only. Having been properly applied for, I think a *certiorari* may again, under the circumstances, be allowed now, on

(a) 4 T. R. 281.

(b) 3 B. &amp; Ad. 887.

(c) Coleridge, J. was sitting in the Bail Court, and Littledale, J. at Guildhall.

proper recognisances being entered into. The rule may be moulded accordingly.

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PATTERSON, J.—The allowance of the *certiorari* mentioned in the 5 Geo. 2, c. 19, s. 2, is by the persons to whom the *certiorari* is directed, and as it has been improperly allowed, a sufficient recognisance not having been entered into, it may go down again to be allowed.

WILLIAMS, J. concurred.

The following rule was afterwards drawn up. "It is ordered, that the allowance of the writ of *certiorari* issued in this prosecution, be quashed, and the recognisances of the defendants discharged. And it is further ordered, that the return to the said writ of *certiorari* be enlarged, and the said writ of *certiorari*, and the orders returned therewith, sent back to the sessions, in order that the said writ may be duly allowed after the said defendants shall have entered into a recognisance, by one of them the said defendants, on behalf of himself and the other inhabitants prosecuting the said writ of *certiorari*, with sufficient sureties, in the sum of 50*l.*, pursuant to the provisions of the statute in that case made and provided."

### CROSS v. METCALF.

THIS action was tried at the last assizes for the county of York, where a verdict was taken for the plaintiff, subject to the award of an arbitrator. The cause alone was referred. The arbitrator afterwards made the following certificate:—"As the arbitrator to whom this cause stands referred, after hearing all the evidence tendered by both parties thereon, and the arguments of counsel, I certify respectfully to the Court, that I am of opinion that it will be agreeable to the justice of the case to allow the plaintiff to amend the replication to the last plea, by substituting for the present a replication *de injuriâ*, or other replication putting in issue all the allegations in that plea, upon payment of the ordinary costs of the amendment and applications for leave to amend, if such an amendment can be ordered to be made in the present stage of the cause." The plaintiff's original replication had specially traversed an allegation in the last plea. A rule having been obtained, calling on the defendant to shew cause why the amendment should not be made according to this certificate of the arbitrator,

November 24th.

A verdict having been taken by consent, subject to a reference to arbitration, the arbitrator certified that it would be agreeable to the justice of the case to amend the replication, which traversed a particular allegation, by substituting a replication of *de injuriâ*. The Court refused to make the amendment.

W. H. Watson shewed cause.—The present is quite a novel application. The judge at the trial would have had no power to amend this replication as is now required. The acts of 9 Geo. 4, c. 15, and 3 & 4 Will. 4, c. 42, only give the power to a judge so to amend in cases of variance. Nor has this Court now the power to make this amendment after trial and verdict, that power being limited to the time when the pleadings are on paper. A replader is never awarded after a material traverse has been taken (a). The Court cannot therefore act in this case on the principle on

(a) See Tidd's Practice, p. 921, 9th edit.

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which replacers are awarded. The verdict has moreover been taken by consent, subject to a reference of the cause as it stands, and the arbitrator is in the position of the judge and jury. The Court has not now the power to say that the reference shall be of a different issue.

*J. Addison, contra.*—This is not an application to the Court under any statute, it is submitted that the Court has power, at common law, to make amendments in any stage of the proceedings. In *Tidd's Practice*, after mentioning the statutes of amendments, it is said (a), "Notwithstanding the general rule, which prohibits amendments not authorised by the above statutes, after the proceedings are entered on record, the Courts, we have seen, have, in particular instances, permitted the plaintiff to amend his declaration or replication, and the defendant to amend his plea in cases where there has been nothing to amend by after issue joined, and after the proceedings have been entered on record, and even after trial has been had thereon, and the plaintiff has been nonsuited, or failed in producing the record." There are several cases where amendments have been made, in as late a stage of the proceedings as the present. In *Richardson v. Mellish* (b), it was done after error brought. The same was done after error brought in an action of trover; *Smith v. Fuller* (c). In *Rex v. Wilks* (d), it was done after the record was made up and sealed. In *Tite v. The Bishop of Worcester* (e), an amendment was made in an ejectment after verdict for the plaintiff. In *Hooper v. Mantel* (f), an amendment was allowed after a rule had been obtained for a new trial. So in *Tufton v. Ashley* (g), an amendment was made on a *quo warranto*, after judgment was entered by disclaimer. So also the constant practice of the Court is to allow material amendments after demurrers. All those cases shew that the Court has the power to do what is now required.—[*Patteson, J.*—There is no instance of altering an issue after verdict.]—In this case there has been a merely nominal verdict, and the trial is in fact still proceeding before the arbitrator.

Lord DENMAN, C. J.—None of the cases cited are similar to the present. It is impossible to grant this rule. By so doing we should place on the record a totally different issue from the one which has been joined, and upon which only the consent to take a verdict was given.

PATTESON, J. and WILLIAMS, J. concurred.

Rule discharged.

(a) P. 713, 9th edit.  
(b) 3 Bing. 334; 9 Bing. 125; 11 Moore, 104; 7 B. & C. 819.  
(c) 1 Ld. Raym. 116.

(d) 4 Burr. 2527.  
(e) 1 Ld. Raym. 94.  
(f) 13 Price, 695, 736; M'Clel. 388.  
(g) Cro. Car. 144.

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## FOWELL and another v. PETRE.

November 24th.

**T**HE defendant was detained at the suit of the plaintiff on the 26th of October, on a *capias* issued the same day, on an affidavit of debt stating that he was indebted to the plaintiffs "in the sum of 500*l.* for principal monies due on a bill of exchange drawn by the defendant on, &c.;" but it was not stated what was the amount for which the bill was drawn. A summons was obtained to discharge the defendant out of custody, on the ground that the affidavit to hold to bail was defective, which was heard before *Littledale, J.* at chambers on the 5th of November. On the 14th of November a rule *nisi* for the same purpose was obtained in this Court, against which

1. An affidavit of debt stating the defendant is indebted to the plaintiff "in the sum of 500*l.* for principal monies due on a bill of exchange," but not stating the amount for which the bill was drawn, is bad.

2. An application to discharge a defendant for this defect was made before a judge at chambers ten days after the detainer, and afterwards to the Court nine days later:—*Held*, that the application to the Court was made too late.

*W. H. Watson* now shewed cause.—A preliminary objection to this rule is, that the defendant did not apply promptly to the Court within the rule of *H. T. 2 Will. 4, I. 33 (a)*, this being merely a case of irregularity. In the case of *Tucker v. Colegate (b)*, it was held too late to take such an objection after the time for putting in bail had expired. The case of *Sharpe v. Johnston (c)* will be cited on the other side; but in that case the objection was one which shewed that the affidavit was altogether void, and not irregular merely. As to the objection to the affidavit, that it ought to have specified the sum for which the bill was drawn, the forms given in *Tidd's Practice* do not contain that statement (*d*). There are also two cases in the Court of *Exchequer, Hanley v. Morgan (e)*, and *Lewis v. Gompertz (f)*, from which it would appear that it was not necessary to state the amount for which a bill is drawn; but the judges afterwards came to a different resolution in the case of *Brooke v. Coleman (g)*. The cases of *Westmacott v. Cooke (h)*, and *Molineux v. Dorman (i)*, are also to the same effect; but then it appears that the ground of all those decisions was, that in those cases, from the amount of the bill not being stated, it might appear that part of the debt was due for interest, for which the defendants could not have been arrested. Here it is expressly stated that the sum is due for *principal monies* due on a bill of exchange.

*Bagley, contrà*.—This case was before *Littledale, J.* on the 5th of November, which was undoubtedly a sufficiently early application, if this case is to be governed by the rule of *H. T. 2 Will. 4*. But this being the case of a prisoner, is not within that rule. An application to discharge a defendant for a defect in the affidavit to hold to bail, may be made at any

(a) 1 Dowl. P. C. 187.

(b) 2 Crompt. & Jerv. 489; 1 Dowl. P. C. 574; 2 Tyr. 496; see also *Fynn v. Kemp*, 2 Dowl. P. C. 620; 4 Tyr. 990; and *Firley v. Rallet*, 2 Dowl. P. C. 708.

(c) 1 Hodges, 294; 4 Dowl. P. C. 324; 2 Bing. N. R. 246; 2 Scott, 407.

(d) This was the case in the older editions, but in the later the amount is stated.

(e) 1 Dowl. P. C. 322; 2 Crompt. & Jer. 331.

(f) 1 Dowl. P. C. 319; 2 Crompt. & Jer. 352; 2 Tyr. 317.

(g) 2 Dowl. P. C. 7; 1 Crompt. & Mees. 621; 3 Tyr. 693.

(h) 2 Dowl. P. C. 519.

(i) 3 Dowl. P. C. 662; see also *Racketts v. Gye*, 1 Har. & Wol. 198; 3 Dowl. P. C. 554; *White v. Sowerby*, 1 Har. & Wol. 213; 3 Dowl. P. C. 584; and *Drake v. Harding*, 1 Har. & Wol. 364; 4 Dowl. P. C. 34.



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time (a). On the other point, the cases of *Brooke v. Coleman*, *Westmacott v. Cooke*, and *Molineux v. Dorman*, are express authorities to shew that this affidavit is not good.

Lord DENMAN, C. J. (b).—If the application is not out of time this rule must be made absolute; the affidavit is clearly bad. Parties must not take on themselves to vary these expressions in the forms regularly adopted. I do not know what is intended to be meant by the term "principal monies (c)." We think it better however to speak to my brother *Littledale* as to the point of the application being within time, and learn what occurred before him.

*Cur. adv. vult.*

Lord DENMAN, C. J. (the next day).—We have spoken to my brother *Littledale*, and we are now of opinion that the application was made too late.

Rule discharged.

(a) See *Rocke v. Johnson*, 4 Dowl. P. C. 405; 1 Tyr. & Gr. 43; *Primrose v. Baddeley*, 2 Dowl. P. C. 350; 2 Crompt. & Mes. 468; 4 Tyr. 370; *Foot v. Dick*, 1 Har. & Wol. 207.

(b) *Patteson and Williams, Js.* were also in Court; *Coleridge, J.* was in the *Bail Court*, and *Littledale, J.* at *Guildhall*.

(c) See the case of *Robins v. Grant*, 1 Will. Wol. & Dav., *Bail Court*, T. T. 1837.

### MERCERON v. MERCERON.

November 11th.

The Court will not discharge a defendant out of custody though in an ill state of health, and though it appears by the plaintiff's particulars of demand that the action is barred by the Statute of Limitations.

THE defendant, who was very much affected with paralysis, was arrested in *January* last, and still continued in custody. By the bill of particulars delivered, it appeared that every item of the plaintiff's demand was barred by the Statute of Limitations, which the defendant had pleaded, and as to which issue was joined.

*G. Price* moved in the *Bail Court*, on the authority of the cases of *Summer v. Green* (d), and *Wightwick v. Bankes* (e), to discharge the defendant out of custody on entering a common appearance. He argued from those cases, that where a defendant can shew a reasonable probability of obtaining a verdict, as in this case, the Court will grant this rule, especially if he also be in an ill state of health.

LITTLEDALE, J.—The Courts have not latterly been accustomed to proceed on such grounds in discharging a defendant out of custody. You had better make your application to the full Court.

*G. Price* afterwards renewed his motion in the full Court.

*Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day.—We have looked into the

(d) 1 H. Black. 301.

(e) *Forrest*, Ex. Rep. 153.

cases cited, and doubt whether those decisions would now be supported; but, at all events, we think them inapplicable on the present occasion. The rule therefore must be refused.

PATTESON, WILLIAMS, and COLERIDGE, Js. concurred.

Rule refused.

King's Bench.

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### LILLIE v. PRICE.

**A**CTION for a written libel. *Plea*, the general issue, tried before Lord Denman, C. J. at the sittings for *Westminster* after last term. Verdict for the defendant. The libel complained of was contained in a letter written by the defendant to a Mrs. Crow, whose husband had been a client of the defendant, and relating to matter about which the defendant had been employed as Mr. Crow's attorney. His lordship, upon the letter being read, and these facts proved, stopped the case, and told the jury, that in his opinion the letter was a confidential communication from the defendant as an attorney to his client.

November 5th.

In an action of libel, *plea*, the general issue :—*Held*, that the defendant was not precluded by the rule of H. T. 4 IV. 4, r. 4, from setting up as a defence at the trial that the matter complained of was the subject of a privileged communication.

Sir W. W. Follett now moved for a rule to set aside the verdict and to have a new trial, on the ground of misdirection.—The plea being only the general issue, the learned judge was incorrect in desiring the jury to find a verdict for the defendant on the ground that this letter was a privileged communication. A defendant cannot, since the new rules of H. T. 4 *Will.* 4, r. 4, avail himself of such a defence, unless he has specially pleaded it. The object of those rules was to prevent any defence from being offered at the trial, of which the plaintiff has not been previously apprised by the pleadings, and that reason applies as strongly to exclude this defence as any that can be suggested. In *Smith v. Thomas* (a) the defendant pleaded, that the words spoken were a privileged communication, and the Court there did not consider that such plea amounted to the general issue; arguing, therefore, *e converso*, it was necessary in this case that such a defence should be specially pleaded. So in the case of *Barnett v. Glossop* (b), it is laid down that the general issue is now reduced to a mere denial of matter of fact, and cannot be considered as involving matters of law as well as of fact; and that all matters in confession and avoidance must be specially pleaded. In *trover*, the question which is put in issue by the plea of not guilty, is, merely whether there has been a conversion in fact, not whether that conversion has been wrongful or not; wherever the defendant intends to insist that the conversion was lawful, such defence must be specially pleaded; *Stanciffe v. Hardwick* (c). Apply the principle of that case here; sending the letter in question is *prima facie* wrongful; if it is intended to be justified, the circumstances of justification should be pleaded specially. There is another class of cases which have an analogy with the present—those in which it is intended to take advantage of the Statute of Frauds. There the general issue says that the defendant did not contract, and the plaintiff cannot prove that he did—cannot make out his case without producing the paper containing the agreement; still in all these cases it has been held that the

(a) 1 Hodges, 353; 2 Bing. N. C. 372.

(b) 1 Hodges, 94; 1 Bing. N. C. 633.

(c) 1 Gale, 127; 2 C. M. & R. 1; 3 Dowl. P. C. 762.

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defendant cannot avail himself of the non-compliance by the plaintiff with the statute, without specially pleading it. The object of the new rules will certainly not be effected, if in such cases as these, even where the defence does amount to the general issue, it is not held necessary to plead it. The plaintiff will be as much liable to a surprise since the rules as he was before.

Cur. adv. vult.

Lord DENMAN, C. J. at a subsequent day, delivered the judgment of the Court.—In this case the plaintiff complained of certain expressions contained in a letter written by the defendant. The defence offered was, that these expressions being employed by the defendant in his character of attorney, were a privileged communication; and the question was, whether this ought to have been pleaded specially, which it was not. We are all of opinion, after consultation with the other judges, that this defence does not require to be pleaded specially. It goes to the very root of the action; it shews the party not guilty of malice, and consequently it is open to him without having pleaded it.

Rule refused.

## JONES, Gent. one &amp;c. v. READE.

November 5th.

Debt on an attorney's bill for business done in conducting a suit at law. *Pleas, nunquam indebitatus*, a set-off, and money paid into Court:—*Held*, that the defendant was not precluded by the rule of *H. T. 4 W. 4*, r. 3, from giving in evidence a contract that the business should be done for "the money out of pocket."

**D**EBT on an attorney's bill. *Pleas, nunquam indebitatus*, except as to part, set-off, and money paid into Court, which was taken out by the plaintiff. At the trial before *Vaughan*, J. at the last Assizes for *Chester*, the plaintiff proved his retainer, and the amount of his bill, for business done in conducting a law suit. The defence set up was, that the plaintiff had agreed to do it for the "money out of pocket." On behalf of the plaintiff it was contended that this defence was inadmissible under the existing record. The learned judge however admitted it, and a verdict was found for the defendant, which

*J. Jervis*, by permission of the learned judge, now moved to set aside, and to enter a verdict for the plaintiff for the amount of his taxed costs, less the payments made by the defendant. The defendant could not avail himself of this defence under the present state of the record; since the new rules it should be specially pleaded. The payment of money into Court also admits the character of attorney, in which the plaintiff sues; and that being so, it admits his right to fees in that character. He ought not, therefore, to have been allowed to dispute these facts at the trial. *Edmunds v. Harris* (a) decided, that under a plea of *nunquam indebitatus* the defendant could not give evidence that the goods were sold on a credit not yet expired.—[Lord Denman, C. J.—That case has been overruled (b).]—[*Patteson*, J.—The payment admits that business has been done, but it does not admit the terms on which it has been done.]—It admits the contract, and therefore admits the character in which the plaintiff made that contract, and its terms.

(a) 2 A. &amp; E. 414.

(b) See *Cousins v. Paddon*, 1 Gale, 305; 2 C. M. & R. 547, and the other cases therecited; also *Brookefield v. Smith*, 1 Mee. & Wels. 542.

LORD DENMAN, C. J.—The pleadings say that the defendant is not indebted except to a certain amount; they admit a contract, leaving the terms of that contract to be ascertained by evidence.

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PATTESON, J.—The fallacy seems to be in assuming that on a common *indebitatus* account, the undertaking must have been to pay at an attorney's rate of charging.

WILLIAMS, J. and COLERIDGE, J. concurred.

Rule refused.

### GILBERT and another v. DALE.

November 8th.

**ASSUMPSIT.** The declaration stated that the defendant was the keeper of a booking-office for the booking, receiving, and taking care of boxes and parcels, in order that the same might be forwarded to the several persons to whom the same might be respectively directed; and that the plaintiff, at the request &c., delivered a certain box to the defendant, that it might be forwarded to *Thomas Jeffries, Esq., Cott Moor, near Pembridge, in South Wales*, and that the defendant undertook to take care of the box in order that it might be forwarded to the person to whom it was addressed, but afterwards so negligently, &c. conducted himself that it was lost. First *plea, non assumpsit*; second, that the box was not lost through any negligence or improper conduct of the defendants. Upon which pleas issue was joined. At the trial before Lord Denman, C. J. at the sittings at *Westminster* after last term, it appeared that the defendant is the proprietor of the *Gloucester Coffee-house*, and keeper of the booking-office there: that a box, addressed to a customer of the plaintiffs, was delivered at the defendant's office 5th June, 1833, and a receipt for it given by the defendant's clerk. That no directions were given by the plaintiffs as to the particular conveyance by which the box was to be sent, and that the box never arrived; upon which the counsel for the defendant submitted that there was no evidence to shew that the loss had arisen from negligence of the defendant. The learned Lord Chief Justice being of that opinion, accordingly directed a nonsuit.

In *assumpsit* against the keeper of an office for the booking, receiving, and forwarding of parcels, who is not a carrier, for the loss of a parcel delivered to him for the purpose of being forwarded, it is not sufficient to raise even a *prima facie* case against him to shew the non-arrival of the parcel at the place of its address: some evidence must be given to shew his non-delivery of the parcel to a carrier.

*Platt* now moved for a rule *nisi* to set aside the nonsuit and for a new trial.—There was sufficient evidence to go to the jury of neglect by the bailee. In *Griffiths v. Lee* (a), *Hullock, B.* held that circumstances precisely similar to the present were sufficient to raise a *prima facie* case against the defendant. The effect of the evidence is for the jury to decide on *Aston v. Heaven* (b). Here there was evidence to raise a presumption that the bailee had not discharged his duty. The plaintiff cannot be expected, nor indeed has it in his power, to prove a non-delivery by the defendant to the carrier better than he has done; all that he can know is, that he left the box at the defendant's office, and the consignee was called to shew that he never received it. The burthen of proof then lay upon the defendant, and it would have been easy for him to discharge himself, if the box ever had been delivered, by calling some one cognisant of the fact; whereas there is no kind of

(a) 1 Car. & Payne, 110.

(b) 2 Esp. 533.

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limit to the evidence which the plaintiff must have called if he is to be put to prove a negative.

PATTESON, J.—I think that the nonsuit was right; what is in evidence in this case to prove negligence on the part of the defendant? Look at what the contract is; the defendant is not a carrier, he is the keeper of a booking-office, and his contract with the plaintiff is to take care of goods to be forwarded by coach to their destination; his contract is to deliver them to some carrier for the purpose of their being conveyed. It is necessary, therefore, in order to prove a breach of contract, either to shew by direct evidence that the goods were actually taken away or lost out of the office, or some fact from which it might be implied that the defendant did not deliver them to a carrier to be conveyed; but was there such evidence here? All that was proved was, that they did not arrive at their destination. The contract of a carrier is to deliver to the consignee, and therefore in the case of *Griffiths v. Lee (a)*, there was sufficient evidence of negligence; but that is not so as regards the keeper of a booking-office, because his contract is to deliver to the carrier only. I think, therefore, that the nonsuit was right.

WILLIAMS, J.—I am of the same opinion. This is not like the ordinary case to deliver to the consignee. What was the undertaking by the defendant? Not himself to deliver the goods to the consignee in *Wales*, but to deliver to another, which other was to convey, and deliver them there. It is uncertain whether the loss took place in the hands of the original party, the defendant, or whether he had got rid of his obligation by delivery to a carrier. It seems to me there is nothing to fix the defendant.

COLERIDGE, J.—I am of the same opinion. We are not laying down any new principle, but merely applying the principle which already exists with respect to carriers. The law presumes that they perform their duty, which is, to deliver at a particular place. In order to raise the inference of negligence against them, the plaintiff must produce some evidence to shew a non-delivery there. The burden is then thrown on the carrier to discharge himself. Apply that rule to the present case. The defendant has undertaken to deliver to a carrier, not to the consignee. The plaintiff, therefore, must give some evidence of non-delivery to the carrier; he attempts to do that by shewing a non-delivery to the consignee, which is not what was undertaken to be done. Suppose a case where there are two or three carriers, one undertaking to convey to *York*, another to *Newcastle*, and another to *Edinburgh*, would it be enough, in order to charge the first, to shew that the goods did not arrive at *Edinburgh*? Because that is what the plaintiff has done in this case.

Lord DENMAN, C. J.—The duty of the defendant was to forward, and not to deliver to the consignee; that clearly was the contract between the parties. On the trial it was said that you might as well attempt to charge the porter, whose duty was to take a parcel to the shipping-office, for the

(a) 1 Car. & Payne, 110.

purpose of being conveyed to *India*, upon proof that it had not arrived at *Calcutta*.

*King's Bench.*

Rule refused.

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TURNPIKE ROAD.

*November 9th.*

THE defendants are the trustees under a local public act for altering, &c. the road between *Norwich* and *Watton*, in *Norfolk*, whereby they are empowered to use certain hereditaments specified in the schedule, on making satisfaction to the owner. Not agreeing with the parties interested in some of the hereditaments specified, they proceeded under the General Turnpike Act, 3 G. 4, c. 126, under which they were also trustees. The 85th section of that act empowers trustees of roads in such cases, *after thirty days' notice* to the parties, to impanel a jury to inquire into and assess the value of the premises in question, damages done, &c., and directs the trustees thereupon to order the money so assessed to be paid to the owners, according to the verdict of such jury; and enacts, that "such verdict or inquisition, and judgment, order, and determination thereon should be final, binding, and conclusive to all intents, &c." The premises in question are leasehold, and two-thirds of the interest therein belonged to *Elizabeth Strickland*, and the remaining one-third was held by *Henry Etheridge Blythe*, *Thomas Thurlow Wiseman*, and *Henry Gridby*, in trust for *Thomas William Rogerson*. Due notice was sent to each of these individuals. A jury was impanelled, and the oath administered to them was "to inquire, ascertain, and assess the sum or sums of money to be paid by the trustees of the road, to *E. S.*, *T. W. R.*, *H. E. B.*, *S. T. W.*, and *H. G.*, some or one of them respectively, as the value, recompence, or satisfaction of and for their respective estates, rights, and interests." The jury by their inquisition found one gross sum, 85*l.*, as the value of the interest of all the parties in the premises to be paid to them, "according to their respective proportions therein," without at all specifying what those proportions were. The inquisition set out the oath of the jury. It did not refer in any way to the notices which had been given.

1. Where a jury are impanelled under the General Turnpike Act, 3 G. 4, c. 126, to assess the value of the several interests of *A.*, *B.*, and *C.* respectively, in land taken by the trustees, the inquisition must specify the sum due to each respectively.
2. The inquisition is the substantial and final part of the proceedings, cannot be altered by the order of the trustees, and a *certiorari* lies to remove the inquisition before their order has been made.
3. *Semble*, that the inquisition should set out the notices given by the trustees.
4. With respect to proceedings under 3 G. 4, c. 126, the *certiorari* is not taken away by 4 G. 4, c. 95.

*Austin*, in *Michaelmas* Term, 1835, obtained a rule, calling upon the defendants to shew cause why a *certiorari* should not issue to remove the inquisition and also the several notices into this Court, that they might be quashed, on the grounds that the notices of the trustees to the parties interested were not set out in the inquisition; and that the inquisition ought to have determined the proportion of the money due to the parties respectively.

*Kelly* and *Palmer* now shewed cause.—There is nothing in the act which calls on the jury, or any other party, to recite the notices; it is no part of their duty to find whether the notices were delivered or not, it was not their duty to inquire; they had only to look to the value of the property; they had no means of knowing whether they were delivered or not. It might be necessary to recite them in the judgment, that is, in the final order of the

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tice having been given as aforesaid, and of such recognisance having been entered into in manner before directed, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against, as the said justices shall think proper to be levied and recovered, as hereinbefore directed, and the determination of such Quarter Sessions shall be final and conclusive to all intents and purposes, and no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by *certiorari* or any other writ or process whatever, into any of his Majesty's Courts of Record at Westminster, any law or statute to the contrary notwithstanding: Provided always, that in case there shall not be time to give such notice, and enter into recognizances as aforesaid, before the next sessions to be holden after the conviction of the appellant, then and in every such case such appeal may be made to the next following sessions, and shall be there heard and determined."

The 86th section of the 4 G. 4, c. 95, recites the 145th section of the 3 G. 4, c. 126, and repeals it. The 87th section of the 4 G. 4, c. 95, enacts, "Provided always, and be it further enacted, that if any person shall think himself or herself aggrieved by any order, judgment, or determination made, or by any matter or thing done by any justice or justices of the peace, or by any trustees or commissioners of any turnpike road, in pursuance of this act or the said recited act, or any local act for making, repairing, or maintaining any turnpike road, (except where the order, judgment, or determination of any such justice or

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to pay. Indeed there is nothing to shew that it may not be verbal, and if not necessary to be made in writing, certainly it is not necessary to wait till it is made, before a *certiorari* can issue. But suppose otherwise, still the order must follow the finding of the jury, and therefore would have the same defects in it. If otherwise, the trustees might alter or amend, as if it had been a bad notice. That is, if dissatisfied with the finding of the jury, they might correct it themselves. In all cases where the proceeding is to be binding, it must shew on the face of it an authority for that proceeding; therefore the notices should have been set out on the face of the inquisition. *Rex v. Mayor of Liverpool* (a), *Rex v. Bagshaw* (b), *Rex v. Sheppard* (c), *Rex v. Wilson* (d). The inquisition must shew that the jury were properly summoned. The argument used proves too much; according to that it need not shew any authority at all, but it is quite clear that the precept of the trustees must be set forth. Then it is admitted on all sides that the interests of the parties were different, their affidavits shew it. The jury were sworn to assess the damages respectively, and they have only done it in gross. If the money were paid to any one of these parties, how were the others to obtain it? How is it possible to divide the damages among these five parties? The costs also are to be divided by the inquisition, therefore it ought to shew who are liable to them, and in what proportions. The costs are to be levied by distress—how would it be possible so to levy them here? No damages are assessed as a recompence to the claimants for the expense of keeping up additional fences, which by reason of this road they would be obliged to do; *Rex v. The Commissioners of Llandilo Roads* (e).

Lord DENMAN, C. J.—The first objection to this inquisition is, that it does not contain the notice required by the act of parliament, in order to give jurisdiction to the jury. It is not necessary to enter into that, because *Rex v. Bagshaw* (b) clearly shews, that if no notice appears upon the face of the whole proceedings, they are void. Neither need we inquire whether such defect can be supplied afterwards, because I think that another conclusive objection exists to the inquisition. The jury were impanelled and sworn to assess the respective value of the respective estates of the several parties interested; instead of doing that, they have awarded a sum in gross for the whole, leaving each party in doubt as to the proportion to which he was entitled.

But a question has been raised, whether we can entertain this application by reason of the 87th section of 4 G. 4, c. 95, which enacts, "that no proceeding to be had or taken in pursuance of that act, shall be quashed or vacated for want of form or removable by *certiorari*." We are called upon to presume that these words, "in pursuance of this act," mean, as well any thing required to be done by 3 G. 4, as by 4 G. 4, because the 87th section commences by giving an appeal, as well for matters done under the former as the latter; but I do not admit of that conclusion. I think that the two acts were intended to operate distinctly, and that the words "in pursuance of this act," must be confined to acts done in pursuance of some enactment of that act, and does not extend to those which are merely recognised and re-

(a) 4 Burr. 2244.
(b) 7 T. R. 363.
(c) 3 B. & A. 414.

(d) 5 Nev. & Man. 164.
(e) 2 T. R. 234.

ferred to by it. Then it is said, that an appeal is given by the same 87th section, and that in all cases where an appeal was given, the *certiorari* was intended to be taken away. Assuming such to be the intention, still it does not appear that any appeal is given in this case. The appeal is only given against an act done by a justice, trustee, or commissioner. Now, an inquisition is not an act done by any one of those parties, but by the jury who were impanelled and sworn for that purpose. I think, therefore, that the *certiorari* was not taken away; and also, that there is a fatal defect in the proceedings.


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PATTESON, J.—I am clearly of opinion that the 87th section of 4 G. 4, does not apply to the present proceedings, which were not in any way proceedings under that act. By that section the *certiorari* is taken away only as to proceedings “in pursuance of this act,” and these words, taken alone, clearly do not apply on the present occasion. But then it is argued, that because in the same section an appeal is given, not only with respect to acts done under this act, but also under other acts, that therefore the taking away of the *certiorari* was intended to be co-extensive with the giving of the appeal. If that were the intention, it has not been effected. Neither can I think that such was the intention. Because, since, in one part of the section, the words are, “this act, the said recited act, or any local act;” and in another, “this act” alone, I must suppose that the omission in the latter occasion was intended to restrict the operation of the enactment to proceedings done under “this act” only. At all events, if it had been held that the words *this act* must be construed to mean *any act*, then the word *hereby*, occurring in the exception, must mean *by any act*. No doubt the exception is very absurdly varied from the enacting clause. However, the better way seems to be to abide by the words of the act, and as the *certiorari* is taken away from the proceedings under *this act* only, and these are not proceedings under this act, therefore the *certiorari* is not taken away. As to the point that this inquisition is not a final proceeding, the words of section 85 of 3 G. 4, c. 126, are, “that after the said jury shall have inquired of and assessed such damages and recompence, they, the said trustees or commissioners, shall *thercupon* order the sum so assessed by the jury to be paid to the said owners or other persons interested, according to the verdict or inquisition of such jury;” and it further provides, “that such verdict or inquisition and judgment, order and determination thereon, shall be final, binding, and conclusive.” This involves a contradiction in terms, because a judgment is not a verdict, it is a consequence of it. It is difficult to understand which of the two was meant to be made final; I think the best way of treating the sentence is, to say it has no meaning at all. However, the question we have to determine is, whether the inquisition alone, before the order of the trustees has been made, is so far final as to admit of the present application being made. I think that the trustees have no power to make the judgment; all that they are directed to do is to make the order for the payment of the money to the parties interested, according to the inquisition of the jury. The order is not a judgment, the duty of the trustees is merely ministerial; it is the inquisition itself therefore which is final and binding; therefore we may look at the inquisition itself. And as to that, I think the objection mentioned by my lord is fatal. The jury were sworn to assess the sum to be

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paid to each of the parties respectively, as the value of each respective estate, but instead of that they have awarded one gross sum to all of them.

It becomes, therefore, unnecessary to inquire whether it is necessary to set out the notices in the inquisition. I do not wish to be understood as saying that the notices must be set out, although I incline to think that they ought; not as a finding of the jury, but analogously, if I may so express myself, to the caption of an indictment.

WILLIAMS, J.—The only doubt which I have felt in this case has been, whether the proceedings were sufficiently complete to admit of this application being made. And that doubt was wholly removed upon it appearing that the order of the trustees is altogether a ministerial act, and must necessarily merely follow the inquisition of the jury. And that inquisition I think defective, for the reasons that have been already given. I also am of opinion, that the notices ought to have appeared on the face of the inquisition, inasmuch as they form the entire foundation of the jurisdiction possessed by the jury in the present case. An order of magistrates is always supposed to receive the fullest protection from this Court, and it certainly is necessary that the authority of the magistrate should appear upon the face of that document.

As to the existence of the *certiorari*, it is established that a *certiorari* can only be taken away by the clearest and most distinct words. I therefore think it has not been taken away here, for the words used are any thing but clear and distinct.

COLERIDGE, J.—The most important question to be considered is, whether the *certiorari* has been taken away. I always have understood the rule to be, that an appeal can be given, and a *certiorari* taken away by express words only. *Rex v. Terrett* (a) is an instance of the strict observance of that rule. By an act of parliament jurisdiction was given to an inferior Court, and as to the proceedings under that act the *certiorari* was taken away. A subsequent act extended the jurisdiction of the Court, but contained no provision relative to the *certiorari*. And it was held, notwithstanding the prior enactment, that a *certiorari* existed as to all proceedings under the latter act.

In the present case the proceedings were under 3 G. 4. The clause in that act taking away the *certiorari* was repealed by 4 G. 4. The question then is, whether the right of *certiorari* there revived, has been again taken away by 4 G. 4. I think clearly not, because the clause in 4 G. 4, taking away the *certiorari*, is confined to proceedings had in pursuance of that act only. An argument has been raised, that as a right of appeal has been given, that therefore the *certiorari* must be presumed to be taken away. The answer to that is, that the *certiorari* cannot be taken away by implication only. There may be an appeal and yet no *certiorari*, and *vice versâ*, there may be a *certiorari* and yet no appeal. The argument is one of probability only.

With regard to the next question, whether this application could properly be made in this stage of the proceeding; the rule which I understand to exist is, that so soon as the proceedings have arrived at such a stage, that any error made is irremediable; then the party interested may apply to this

(a) 2 T. R. 736.

Court for the purpose of having that error corrected. Then have the proceedings arrived at such a stage on the present occasion? It is perfectly clear that they have, because that error which has been shewn to exist is one which, unless corrected by this Court, must remain throughout and up to the end of the proceeding. The jury have not done that which they were impanelled and sworn to do; and instead of that, they have put things in such a state that the most serious questions must arise as to the claims of the parties to their respective proportions, both of the sum of money, and as to the costs awarded. Suppose, in addition to the lessees of this property, all entitled to different shares, as appears by the notices, the owner in fee and the reversioner had also been claimants for compensation, the form of impanelling and swearing the jury would have been just the same. And then, according to the argument, although the finding had been just in the same form of one gross sum for all these claimants, still that finding would have been good, although it would have been impossible afterwards to ascertain the relative proportions in which they were entitled. Such a defect seems to me substantially irremediable, and I therefore think the parties are entitled to make this application in the present stage.

Rule absolute.

DOE *d.* ROWLANDSON *v.* WAINWRIGHT.

EJECTMENT, tried before *Coleridge, J.* at the Summer Assizes held at *Liverpool*. The lessor of the plaintiff relied on a deed of feoffment, under which the premises in dispute were conveyed to *Michael and Jeremiah Williams*, and their heirs, to the use of *Michael and Jeremiah*, and the heirs and assigns of *Michael*, in trust for *Michael Williams*, his heirs and assigns. It was proved that the *Williams's* had been in possession of the premises, and also, after the execution of the feoffment, and after possession by the *Williams's*, one *Houghton*, an attorney, had also been in possession. The plaintiff called upon the defendant to produce the feoffment, and upon his refusal, having proved a notice to produce it, called as witness a clerk to *Houghton*, by whom, as the witness stated, the premises had been sold to the defendant, on which occasion an abstract, containing a correct statement of the contents of the feoffment, was prepared, and had been in his possession ever since. He also stated that the feoffment was delivered to the defendant on the occasion of the sale; and that there was an attesting witness to the feoffment, and an indorsement of livery of seisin. He then produced the abstract, which was offered in evidence. This was objected to. It was also urged that the attesting witness ought to have been called to prove the execution of the deed, and that it was necessary to prove actual livery of seisin. The learned judge admitted the abstract in evidence, and held that it was not necessary to call the attesting witness, or to give evidence of actual livery of seisin; but afterwards, on a verdict being found for the plaintiff, gave the defendant leave to move to enter a nonsuit.

the vendor, who proved that it was made on the occasion of the sale, and had been in his possession ever since:—*Held*, that the defendant must be presumed to hold under the feoffment, and that not having, after due notice, produced it, the abstract was admissible in evidence, that it was not necessary to call the attesting witness to prove the execution, nor to give evidence of actual livery of seisin.

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November 3d.

In an action of ejectment it was proved, that on the occasion of a sale of the premises to the defendant, a feoffment of them was handed over to him by the then vendor, an attorney, that the parties, to whose use the feoffment was made, had possessed them, and that after the execution of the feoffment, and after their possession, the premises had been in the possession of the vendor; the execution of the feoffment was attested by a witness, and there was an indorsement upon it of livery of seisin, also attested by a witness.

At the trial an abstract of the feoffment was produced by a witness, clerk to

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Neville now moved accordingly.—When secondary evidence is admissible the best must be offered that can be produced; *Mun v. Goodbold* (a). An abstract is not such evidence. The best secondary evidence of a deed is a counterpart; the next, an examined copy; an abstract is the lowest kind of secondary evidence. Next, the subscribing witness to the deed ought to have been called. Mr. *Starkie* (b) lays down in very clear and strong terms the necessity to call the subscribing witness to a deed, and the reasons for that necessity. It was said at the trial, that as the defendant claimed under the deed of feoffment, it was not necessary formerly to prove its execution; and *Doc v. Hemming* (c) was cited in support of that position. But here there had been nothing done by the defendant to recognise the validity of the deed, as there had been by the attorney of the lessors of the plaintiff in that case. For even if a sale did take place, of which there was no legal proof, and the feoffment was handed over on that occasion, still the only necessary inference from that is, that the *equitable* estate was transferred, an estate of which the Court can take no cognisance in an action of ejectment. There was nothing before the Court, therefore, to shew that the defendant did claim under the feoffment. Moreover, even if this objection did not exist, it would often be a great hardship upon a purchaser to assume that he holds under the deeds delivered to him at the time of the purchase. He may find it expedient to rely simply on his profession, repudiating the deeds delivered; and there is no reason why he should be deprived of the advantage of doing so, and placed in a worse condition than if he had no title-deeds. Again, livery of seisin is the efficient part of a feoffment, and of this there was no proof. Before the Statute of Frauds, when feoffments by parol were frequently in use, they must have been proved by evidence of the livery of seisin, and that statute has not altered the mode of proof. Nor will it be presumed from the indorsement that a livery had actually taken place; *Doc v. The Marquis of Cleveland* (d); and Mr. Justice *Buller* (e) lays it down, that the proof of due execution of a feoffment is not sufficient alone to establish a right, but that livery of seisin must also be proved; and it is a fact which the jury must expressly find before the Court can adjudge the conveyance to be good. Here there was no such finding.

LORD DENMAN, C. J.—In this case the defendant, after due notice, having declined to produce the feoffment under which the plaintiff claimed, the plaintiff offered an abstract as secondary evidence of the feoffment itself. The abstract had been prepared by the witness producing it, a clerk to one *Houghton*, an attorney, the vendor, on a conveyance to the defendant. I think that this abstract was receivable, provided the defendant claimed under it. *Houghton*, it appeared, entered on the premises after the feoffment was executed, and after the *Williams's*, parties to whose use it was made, had been in possession under it, and was in possession of the premises when he sold them to the defendant. Surely it would be unreasonable to assume that the defendant did not claim under *Houghton*, or that the latter did not claim under the *Williams's*. As to the objection, that livery of seisin ought to have been proved, it is obvious, that if it be not necessary to prove the

(a) 3 Bing. 292.

(b) 1 Stark. Ev. 320, where the cases are collected.

(c) 6 B. & C. 28.

(d) 9 B. & C. 864.

(e) Bull. Nisi Prius, 256, a.

feoffment itself, it cannot be necessary to prove livery of seisin, the operative part of a conveyance of feoffment.

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PATTESON, J.—I am of the same opinion. The first question to be considered is, whether the abstract was sufficient secondary evidence of the feoffment. I do not mean to say, had it been proved that a copy was in existence, that the copy ought not to have been produced. The books certainly do lay down that a counterpart of a deed is the best evidence of it, a copy the next; an abstract is placed last in the order. Still, in the absence of secondary evidence of a superior degree, no objection can be raised to the admission of an abstract. Here there was no evidence whatever of any counterpart having existed at all. It lay on the defendant, before he could object to the secondary evidence offered, to shew that better secondary evidence was producible; and as he did not do that, the abstract was properly admitted. It was next objected, that the subscribing witness should have been called; but if it appeared that the defendant claimed under the feoffment, that certainly was not necessary. Had the defendant produced the feoffment, it cannot be contended that it would be necessary. Here he did not produce it, but it was proved that he received it when the conveyance was made to him and he took possession. It would be rather too much to allow him, for the purposes of this cause, to say that he does not claim under it. His mouth, I think, is closed. The subscribing witness then need not be called. So with respect to the livery of seisin, had the feoffment been produced with livery of seisin indorsed, it would not have been necessary to prove actual livery, because the party producing it claimed under it. Here the production of it was dispensed with, for a reason which places the party not producing it in the same situation with respect to livery of seisin as if he had produced it. Then it is said that the jury did not find livery of seisin, but in effect they did. They found for the plaintiff, and that finding involves a finding of livery of seisin.

WILLIAMS, J.—The moment that any secondary evidence is let in, all is let in; subject, no doubt, to be marshalled according to its goodness in degree. As in this case, however, there was no proof that any counterpart or copy was in existence, the abstract was admissible. I think also, that the proof of livery of seisin, and of the execution of the deed by the subscribing witness, certainly was not necessary; because the defendant was a party claiming under the feoffment; and that no doubt he was, since it appears that the feoffment was handed over to him on the occasion of his purchase, as a part of his title. From those circumstances we can draw no other inference.

COLERIDGE, J.—I am of the same opinion. As to the admission of different degrees of secondary evidence, the judge seems to stand somewhat in the nature both of judge and jury; much in the same way as when it becomes his duty to determine whether there has been sufficient search for the original document in order to let in secondary evidence at all. There is no general technical rule. With respect to the abstract, from that it appeared that there was an attesting witness to the original deed. I thought that the present fell within the principle of those cases which determine, that where a party claims under a deed, and he produces that deed on notice, it is not necessary for the other party to prove the execution of it. It appeared that *Houghton*, an attorney, being in possession of the property, and also of the

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feoffment, sold the property to the defendant, on which occasion the abstract was prepared, and ever since had remained in the possession of the witness producing it, but that the feoffment was handed over to the defendant. Now if the defendant had produced the feoffment, it would not have been open for him to say, "I do not claim under this feoffment." All the evidence shewed that he did; therefore it would not in such case have been necessary to call the attesting witness as against him; and if not, what creates that necessity when secondary evidence of the deed is to be given? I think with the rest of the Court, that since no evidence was given of the existence of a copy, the point as to the reception of the abstract does not arise. Under the circumstances no doubt parol evidence was admissible, and to my mind, an abstract of the material parts of the deed is far more satisfactory than any kind of parol evidence that could be offered. As to the proof of livery of seisin, it appeared by the indorsement that livery of seisin had been also attested by a witness. I thought that the objection raised on this point fell within the principle which disposed of the other relative to the execution. If not necessary to call a witness for the one purpose, I could see no reason why it should be necessary to call one for the other.

Rule refused (a).

(a) The Court granted a rule nisi for a new trial on another ground.

DEMPILLIERS v. HOLDEN.

November 8th.

In an action upon a bill of exchange purporting to have been drawn by A., resident abroad, upon B., resident in England, the plaintiff having proved that it was seen abroad immediately after the date of it:—*Held*, that it was not necessary, in order to shew that it was a foreign bill, also to prove that the bill was then in an unaccepted state.

ACTION by indorsee against acceptor of a foreign bill of exchange, dated Brussels, tried before Lord Denman, C. J. at the sittings after last term. The declaration alleged the bill to have been drawn beyond seas by Elianson, Clark, and Co., and to have been accepted by the defendant, and to have been indorsed to the plaintiffs. The first plea denied the acceptance, and the second denied the indorsement. The defendant lived near London, and the bill was drawn on plain paper without any stamp. A witness was called by the plaintiff, who proved that he saw Clark, one of the drawers, the day after the date of the bill, at Antwerp or Brussels, and that the bill was then in his possession; but whether or not it was then accepted, he was unable to say. Lord Denman thought, that under these circumstances the bill must be presumed to have been drawn beyond seas, and did not therefore require a stamp, and a verdict was then found for the plaintiff.

Platt, now contended, as he had done at the trial, that there ought to have been distinct proof that the bill, when seen abroad, was in an unaccepted state; because the drawer living near London, it was clear that if the bill were then accepted, it must have been drawn in England.

PATTESON, J.—I do not see any difficulty in this case. The bill was seen abroad the day after the date of it, in the hands of one of the drawers, at Brussels. There would be great inconvenience if, in the case of foreign bills, we were to require evidence that they were seen in an unaccepted state abroad.

WILLIAMS, J. and COLERIDGE, J. concurred.

Rule refused.

King's Bench.

PARRY v. DEERE.

November 8th.

ASSUMPSIT for use and occupation of a messuage and lands, tried at the last assizes for the county of *Berks*, before *Littledale, J.* *Plea*, the general issue, and a set-off:—verdict for the plaintiff. At the trial it became necessary for the plaintiff to give in evidence a lease, by which *Donnington Priory*, and the lands thereto belonging, were leased at a certain rent stated in the instrument; other lands were also leased, the occupation of which was to begin at a subsequent period, and which were described by the instrument as being in the occupation of *Sloccock and Holloway*, and the rent to be paid for them was stated to be the same as was paid by those persons, but the amount which was so paid was not mentioned in the instrument. At the trial *Sloccock and Holloway*, who had held by a parol lease, were called, and they proved the rent which had been paid by them for the lands in question. The lease was stamped with an *ad valorem* stamp, calculated upon the whole amount paid both for *Donnington Priory*, the lands thereto belonging, and the other lands. It was objected at the trial that the lease in question was not admissible in evidence, as not being properly stamped. The objection was overruled by the learned judge, who gave the defendant leave to move to enter a nonsuit.

The proper stamp for a lease, demising a messuage and lands at a rent ascertained by the instrument, and also certain other lands at the rent then paid for them by *A.*, but not mentioning the amount of that rent, is an *ad valorem* stamp calculated upon the whole amount of the rent to be paid for all the lands.

Ludlow, Serjt. now moved accordingly.—This lease does not fall within any of the three kinds of leases which are described in the stamp act. It therefore comes under the class of leases “not otherwise charged,” and ought to have been stamped with a 1*l.* 15*s.* stamp. It was a lease of lands at a rent which was afterwards to be ascertained, no possible *ad valorem* duty was capable of being put on this lease. He then referred to the cases of *Robinson v. Macdonnell* (a), and *Turner v. Power* (b).—[*Patteson, J.*—There is no case which determines what shall be the amount of the stamp, where the document is silent as to the amount of the rent. But upon the principle contended for, supposing *A.* to hold lands at a rent of 1000*l.*, and that the year before he left they were let to *B.* by a lease, reserving “the rent paid by *A.*,” then 1*l.* 15*s.* would be the proper stamp.]

Cur. adv. vult.

At a subsequent day in this term, the judgment of the Court was delivered by

Lord DENMAN, C. J.—This was a question whether a lease demising certain lands at a rent ascertained by the instrument, and also certain other lands at the rent then paid by the existing occupiers, but which rent was not further ascertained by the instrument, fell within the non-descriptive class of leases in the stamp act; and therefore required a stamp of 1*l.* 15*s.* We have no doubt that it is not within the non-descriptive class, and that therefore the stamp, which was an *ad valorem* one, was good. We think the cases cited are not applicable; there will therefore be no rule.

Rule refused.

(a) 5 M. & S. 228.

(b) 7 B. & C. 625.

King's Bench.



The KING *v.* The Lord of the Manor of HEXHAM, and the
Steward of the said Manor.

November 9th.

Where a party claiming a copyhold tenement cannot try his right without admission, the Court of K. B. will compel the lord to admit him, even although another party has already been admitted.

W. H. WATSON, in *Hilary* Term, had obtained a rule *nisi* calling on the defendants to shew cause why a *mandamus* should not issue, commanding them to admit *Richard Errington* to certain copyhold tenements within the manor of *Hexham*, as the right heir of *Elizabeth Armstrong*, deceased, late tenant thereof, according to the custom of the manor. The affidavit of *Richard Errington* stated, that *Elizabeth Armstrong*, in *November*, 1777, died seised in fee of the copyhold tenements in question, having before her death duly surrendered unto the use of her will, by which, after several intermediate devises, she devised to one *William Ord* for life, with remainder over to her right heirs; that *William Ord* afterwards became seised under such will of the said tenements, for the term of his natural life, with remainder over to the right heirs of *Elizabeth Armstrong*, and in *December*, 1801, was admitted for the term of his natural life, and in *November*, 1832, died so seised, whereby the said tenements descended to *Errington*, as right heir of *Elizabeth Armstrong*. That 20th *June*, 1835, *Errington* was found by the homage to be the right heir of *Elizabeth Armstrong*, and claimed to be admitted; but that the defendants had always refused to admit him. The affidavit of the steward stated, that *Ord* was admitted tenant to the tenements in question, not for the term of his natural life, but pursuant to the limitations and remainder over of the will of *Elizabeth Armstrong*. That the evidence offered by *Errington* to shew that he was heir to *Elizabeth Armstrong*, did appear to the defendant conclusive. That by the rolls of the Court, *October*, 1809, it appears that *William Ord* was the right heir (a) of *Elizabeth Armstrong*, failing the limitations in her will, and that he then surrendered to the use of his will. *December*, 1824, he published his will, devising to *Barbara* and *Elizabeth Poole*, as tenants in common. *October*, 1835, they were admitted pursuant to the intention of such will. The affidavit further stated, that the only reasons the defendant had for refusing to admit *Errington* were, that there was a surrender on the rolls of the Court to the use of the will of *William Ord*, who was the last tenant of the premises on the rolls previous to the aftermentioned admission of *Barbara* and *Elizabeth Poole*: that *Ord* had devised the premises in the manner stated, and that *Barbara* and *Elizabeth Poole* were, at the time of the application of *Errington*, entitled by the custom of the manor, and had claimed by their attorney, to be admitted in preference to *Errington*.

J. Bayley, who appeared to shew cause, after stating the facts and calling the attention of the Court to the cases of *Rex v. The Brewers' Company* (b), and *Rex v. Wilson* (c), said that the defendants had no further object in opposing the rule, than to ascertain what this Court should think was the fitting course for them to pursue.

(a) On the roll, "next heir or one of the next heirs."

(b) 3 B. & C. 172.
(c) 10 B. & C. 80.

Per Curiam (a), (without hearing *Watson* at length.)—We think that this rule must be made absolute. And upon this principle, that if the discretion to admit or not wholly rested with the steward, it would sometimes be in his power to exclude contesting parties from trying their rights.

Rule absolute.

(a) Lord *Denman*, C. J. and *Coleridge*, J.

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THE KING v. RICHARD HIGGINS.

November 9th.

MAULE had obtained a rule in *Hilary* Term last, calling upon the defendant to shew cause why the writ of *certiorari* issued in this prosecution, should not be quashed, and a writ of *procedendo* awarded; and why the defendant should not pay to the prosecutor, or his attorney, the costs incurred by him in this prosecution at the *Michaelmas* Sessions, 1835, for the county of *Hereford*. A true bill of indictment was found against the defendant at the *Michaelmas* Sessions, 1834; he appeared and pleaded not guilty at the *Epiphany* Sessions following, and traversed to the *Easter* Sessions. In *March* he sued out a writ of *certiorari*. At the *Easter* Sessions, prior to sending down the *certiorari*, the attorneys of the prosecutor and of the defendant, for their mutual convenience, agreed that the trial should be postponed. At the *Trinity* Sessions the same cause still existed to make it inconvenient for the attorneys to attend, and no notice of trial was given. At these last sessions certain new rules were made, whereby it was provided that the traverses should be taken at an early period of the sessions. Eight days before the *Michaelmas* Sessions, 1835, the defendant gave notice of trial for those sessions, which notice was not countermanded, nor was any intimation given that a *certiorari* had been sued out. The affidavits for the defendant stated, that he attended for the purpose of trying the traverse, and had subpoenaed his witnesses for that purpose, but that the traverse was, notwithstanding the new rules, postponed till the end of the sessions, when the leading barristers and many of the magistrates had left, and when a magistrate, said to be interested, was upon the bench, and that the defendant believing that he could not on such occasion have a fair and impartial trial, then produced his writ of *certiorari*.

The Court of K. B. cannot grant costs to the prosecutor in a Court below, although those costs have been incurred in consequence of the defendant having sued out and improperly kept, without giving notice of it, a *certiorari*, which has been afterwards quashed.

Talfourd, Serjt. and *Kelly*, now shewed cause (b).—The Court has never interfered to order the payment of costs for expenses incurred before the cause came into this Court. The Court of Quarter Sessions have power over the costs; they can, if they think proper, cause the recognisances to be forfeited, and this Court will not interfere with their jurisdiction.

Maule and *Greaves*, in support of the rule.—[Lord *Denman*, C. J.—Do you think that you can maintain your prayer for costs?—There is no doubt of it, as to all costs incurred after granting the *certiorari*, and during the time when the defendant kept it without giving any notice of having it. The costs having been incurred in consequence of the defendant's conduct in abuse of the *certiorari*, the prosecutor is therefore entitled to them. *Jones v. Da-*

(b) The Court made the rule absolute for quashing the *certiorari*, and awarding a *procedendo* on the merits.

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vies (a), Stacey v. Evans (b), Rex v. Allen (c), and Rex v. Bartram (d), are also in point. The latter was an indictment for perjury, removed by *certiorari*, and the Court decided that if a prosecutor gives notice of trial, and afterwards withdraws his record without countermanding his notice in time, he shall pay the costs. That case also shews that the Court possesses an inherent authority to award costs under such circumstances, independent of any statutory enactment, for there is no statute giving the Court authority in cases of perjury. The only question is, when the *certiorari* attaches; and as the sessions are all reckoned as one day, the date will be from the first day of sessions. The circumstances of *Rex v. Pasman (e)* differ from the present. There the *certiorari* was not taken out by the party who gave notice of trial.

LORD DENMAN, C. J. — *Stacey v. Evans* proceeded on the authority of *Jones v. Davies*, which is impugned in *Rex v. Pasman*. We do not find that this Court has any power to grant costs which have been incurred in another Court.

PATTESON, J. WILLIAMS, J. and COLERIDGE, J. concurred.

Rule absolute for the *certiorari* to be quashed, and a *procedendo* awarded, but discharged as to costs.

(a) 1 B. & C. 143.
 (b) 13 Price, 449.
 (c) 1 Comb. 225.

(d) 8 East, 269.
 (e) 1 Ad. & El. 603.

GRIFFITHS and others v. ANTHONY and Wife.

November 11th.

Prohibition lies to a spiritual court if it proceeds to hear exceptions to the inventory exhibited by an executor, even although the exceptions be filed by a legatee.

V. WILLIAMS had obtained a rule *nisi* to prohibit the Consistory Court of *St. David's* from proceeding further in a suit between the above parties. On an affidavit by *Anthony*, shewing that he and his wife, the executrix of her late father, were cited, at the instance of certain legatees named in the will, to appear in the Consistory Court and exhibit an inventory of effects, &c., that upon exceptions being filed by those legatees, answers on oath were filed by deponent and his wife; that the case came on for hearing in the said Court, and that the judge proceeded to examine witnesses as to the truth of the inventory, and of the annuity, and decreed that the inventory was false and fraudulent, and was to be amended according to his minutes. The examination was conducted *virâ voce* by consent of defendant's proctor, to save expense.

Chilton, now shewed cause.—It is admitted that *Henderson v. French (f)*, is a decisive authority on the other side, unless the constant practice existing in the Spiritual Courts to entertain objection to inventories, as stated in *Williams on Executors*, 606, be recognised by this Court. In *Hinton v. Parker (g)*, it was held, that where the proceedings were at the suit of legatees, as in this case, the Spiritual Courts had the power to question an inventory. The irregularity, if any, has been waived by the defendants having asked to amend their inventory, which was allowed on payment of costs.

(f) 5 M. & Selw. 406.

(g) 8 Mod. 168.

Lord DENMAN, C. J.—*Henderson v. French* is a case quite in point, and not to be questioned. I can see no distinction in principle between the case of a legatee and a creditor.

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PATTESON, J. referred to *Catchside v. Ovington (a)*, and *Bewicke v. Ord*, there cited.

WILLIAMS, J. and COLERIDGE, J. concurred.

V. Williams was to have supported the rule.

Rule absolute.

(a) 3 Burr. 1922.

THE KING v. CHITTY.

November 11th.

SIR J. CAMPBELL, A. G., in *Hilary* Term last, obtained a rule calling on *Philip Chitty* to shew cause why an information in the nature of a *quo warranto* should not be exhibited against him, to shew by what authority he exercised the office of councillor in the borough of *Shaftesbury*. The affidavits shewed, that at the time of his election to that office, he was an uncertificated bankrupt; that he had been duly rated, and had paid rates in respect of a house of the value of 30*l.*, and that his name was on the burgess roll.

The statute 5 & 6 W. 4, c. 76, (the Municipal Corporation Act) does not disqualify an uncertificated bankrupt from being elected mayor, alderman, or councillor.

Erle and *Bingham*, now shewed cause.—The question is, whether or not the circumstance that the defendant was an uncertificated bankrupt, disqualified him from being elected. There are two sections of the Municipal Corporation Act material to be considered in this case, the 28th and the 52nd, the one determining those circumstances which qualify a person to be elected, and also those which disqualify him; the other those which cause him to vacate the office after he has been elected. In the 52nd section, there is a provision that any person becoming bankrupt shall vacate the office, and shall not be capable of re-election until after he has obtained his certificate, or paid his creditors in full. The 28th provides that no person shall be qualified to be elected, unless, in the larger boroughs, he is possessed of property to the amount of 1000*l.*, or rated to the relief of the poor upon the annual value of 30*l.*; in the smaller boroughs, of property to the amount of 500*l.*, or rated upon the annual value of 15*l.* There is nothing in the act to shew that uncertificated bankruptcy disqualifies a party from being elected, although it vacates his election if it occurs after it. And there is good reason for this distinction, because bankruptcy may proceed from misfortunes, attaching no blame to the party, or a certificate may be maliciously withheld; and the burgesses, knowing all the circumstances, may still think proper to entrust the party so situated. On the other hand, the election is properly vacated when such circumstances occur subsequent to the election. There the party was elected, appearing and believed to be otherwise than he really was. Such election, therefore, has been procured under mistake, or by fraud, and the act provides, that the office so attained shall be vacated on the discovery. Here there was a full knowledge of all the circumstances

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beforehand. If the construction contended for on the other side be correct, any one who has become insolvent is disqualified from being elected. Or, if a man in his youth had compounded with his creditors, he might remain disqualified throughout his life, whatever wealth he might afterwards obtain. Such a case as the present is neither within the letter nor the spirit of the act, the object of which is to enlarge the power of election. An analogy exists between the rules for municipal and parliamentary elections; many persons are eligible as members of parliament under circumstances, which same circumstances occurring afterwards, would vacate the election. A law officer of the crown, the Attorney-General, for instance, is eligible; but if a person elected a member of parliament be appointed Attorney-General, the appointment vacates his election, and his former constituents have an opportunity, of which they may avail themselves, if they please, to reject him.

Sir J. Campbell, A. G. *contra*.—It has been argued on behalf of the defendant, that the only object of the legislature in assigning the grounds for disqualification, is to prevent the electors from being deceived as to the character and circumstances of the person whom they elect. But this is not so. The legislature says, that persons so disqualified shall not serve. The 52nd section, after providing that any person holding the office of mayor, alderman, or councillor, becoming bankrupt, insolvent, or compounding with his creditors, shall become disqualified and cease to hold his office; enacts also, that he shall be qualified to be re-elected, only upon the obtaining of his certificate, or payment of his debts in full. In the 28th section the rating which is to serve as a qualification, was meant to refer to actual property, an uncertificated bankrupt has no actual property. That section certainly does not say in express words, that an uncertificated bankrupt shall not be elected; but it says so virtually. It requires, as a qualification, the possession of property to a certain amount; or a rating, which must refer to the possession of actual property. The legislature therefore knowing that an uncertificated bankrupt was by these provisions virtually excluded, that the end was already attained by other means, did not re-enact the same provision in other terms. That would have been needless, and mere tautology. However, even if the Court should only feel doubt on the subject, they will make this rule absolute.

Lord DENMAN, C. J.—I agree with the Attorney-General, that if there is any doubt, the matter ought to be more fully and solemnly considered; but I do not think that there is any doubt. We are bound to confine ourselves to the words actually used. We should not be justified in raising the question, for the purpose of considering whether or not an intention to disqualify might be implied from inference of law. We must adhere to the express terms by which the act of parliament directs that parties shall be disqualified. This person does not come within any of them. It has been ingeniously argued, that a house must be considered to mean a house being the property of the party. But it is quite enough to abide by the words of the act, they only require a party to be rated to the relief of the poor, in respect to property of a certain value. Now if this party is rated to the relief of the poor on a house of the value required by the act, he is therefore qualified. A strong infer-

ence may be drawn from the 52nd section, as shewing the intention of the legislature to disqualify the persons mentioned, from being elected; but it certainly admits of the answer given, that the enactment applies only to a change of circumstances occurring after the election. It may be said, that in such case it is very reasonable that the electors should have a fresh opportunity of exercising their judgment. But no such reason exists to disqualify a person from being elected. The electors, when all the circumstances are known before the election, need no further protection; and besides, at all events, if the intention of the legislature was, that those circumstances which vacate the election of a party, also render him ineligible, that intention might have been declared in the 28th section, where the original election is considered; but it is not so declared, and therefore I am of opinion, that this person is not disqualified by any of the provisions of the act.

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PATTESON, J.—I am entirely of the same opinion. The Attorney-General contends for the following construction of the statute. Since it is enacted that all persons must possess a qualification by being rated to the relief of the poor, and no person can be rated unless in respect of some property belonging to them; therefore an uncertificated bankrupt having no property, cannot be rated at all within the meaning of the act. I do not see that that follows, but if it does, it must follow also that no uncertificated bankrupt can be a burgess; however, by the 11th section it is said, that every person occupying a house has a right to be on the rate for the purpose of becoming a burgess, and this clause does not say how or in what right he must occupy, for the purpose of such qualification. Suppose the assignees of an uncertificated bankrupt, who had a lease of a house, should make their election and reject the lease under which he holds, the lessor of the bankrupt then might enter; but if, instead of entering himself, he were to allow the bankrupt to hold on, such bankrupt would then be holding property from which the assignees could not remove him, and might thereby be qualified to be a burgess. I think also, that by the direct words of the 52nd section, the disqualification is confined to a person becoming bankrupt after election.

WILLIAMS, J.—I am of the same opinion.

COLERIDGE, J.—I am of the same opinion. I do not see that you are at liberty to extend by implication, the express words of the clauses creating a disqualification.

Rule discharged.

The KING v. BARDELL and others.

HUMFREY, in *Hilary* Term, had obtained a rule calling upon the prosecutors in this case, and on the arbitrator to whom all matters in differences between the parties were referred by an order of *Nisi Prius*, to shew cause why the arbitrator should not be restrained from further proceeding in the said reference, on the ground that his authority had been revoked; or why the defendants should not be at liberty now to revoke his

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The statutes 9 & 10 W. 3, c. 15, and 3 & 4 W. 4, c. 42, as to references to arbitration, apply to civil proceedings only.

Therefore, by the 39th section of the latter act, a

party to a reference of a criminal proceeding, is not restrained from revoking the authority of the arbitrator.

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authority. A true bill of indictment, for a conspiracy, was found against the defendants at the *Middlesex Sessions, September, 1833*; a *certiorari* was obtained, the indictment removed, and the record made up by the defendants. The cause came on for trial at *Westminster*, at the sittings after *Easter Term, 1834*, before Lord *Denman*, C. J., and at the suggestion of his lordship a juror was withdrawn, and all matters in differences between the parties were referred to a barrister. The order of *Nisi Prius* for the reference was drawn up in the usual form, and served by the prosecutor's attorney, but no appointment was taken out until the 10th *December* last, being a year and seven months after the date of it. An arrangement had been in the meantime entered into between one of the prosecutors and some of the defendants, to leave the matters in dispute to *George Cloud* and *George Little*, who made an award, *November 10, 1834*, which was partially acted on; but afterwards the appointment was taken out and duly served to attend the arbitrator on the 9th of *January* last. The defendants, by their counsel, on that day opposed going into a reference, and a notice of revocation was then signed by one of the defendants, and by two attorneys on behalf of all the other defendants; it was also served on the arbitrator, who subsequently intimated that the better course would be for the defendants to apply to this Court. The only question for the opinion of the Court was, whether or not the words of 8 & 4 *Will. 4*, c. 42, s. 39 (a), are applicable to other than civil proceedings.

Bompas, Serjt. and *Platt*, shewed cause.

Sir *J. Campbell*, A. G. *Humfrey*, and *Knowles*, *contrà*.

LORD DENMAN, C. J.—We are clearly of opinion that a reference of criminal proceedings is not within the act. Parties cannot be deprived of the right they possess at common law to revoke the authority of an arbitrator, except by a distinct enactment. Now the words of the statute refer to two distinct, specific, and perfectly different state of things, but (perhaps unfortunately) they do not apply to indictments. They apply only where there has been a reference either by order of *Nisi Prius*, or in consequence of an agreement between the parties. It is true that here there has been a reference by order of *Nisi Prius*, but not in the case of a civil action, to which case alone the words of the statute apply. The subsequent words of the clause, concerning references by agreement between the parties, are obviously restrained to civil matters only, and therefore inapplicable on the present occasion.

PATTESON, J.—I never had the slightest doubt upon the point. The 39th

(a) That enactment is as follows:—

"And whereas it is expedient to render references to arbitration more effectual; be it further enacted, That the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of Court, or judge's order, or order of *Nisi Prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record, shall not be revocable by any party to such reference,

without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court or any judge thereof may, from time to time, enlarge the term for any such arbitrator making his award."

section of the 3 & 4 *Will.* 4, is plainly drawn; it applies to civil proceedings only, not indictments. The whole act of parliament refers to actions and other proceedings in civil cases only. It first provides for the case of a reference where there is an action pending in Court, and it goes on to provide for the case of a submission containing an agreement; plainly pointing to the words of the statute of 9 & 10 *Will.* 3. That statute is confined to cases of personal actions, or suits in equity. It is stated in a note by Mr. *Chitty* (a), that certain criminal offences, even after they have been made the subject of indictment, may, under that statute, by leave of the Court, be referred. But the fact is not so, the reference of an indictment remains as at common law. In all respects the statute 9 & 10 *Will.* 3, is confined in terms to cases where the remedy is by personal action, or suit in equity.

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WILLIAMS, J.—I am of the same opinion. I do not think that there is any doubt on the subject. It is not material to the decision of the case, but I own I question whether a reference of criminal proceedings was ever contemplated as a case that would occur. However, it is beyond all question either that the act was not intended to extend to such a case, or if intended, that the intention was never carried into effect.

COLEBRIDGE, J.—I think it is clear, upon reading the act 3 & 4 *Will.* 4, c. 42, s. 39, that provision is made first for the cases referable at common law before the statute of *Will.* 3, and next for those made referable by that statute, and for those only. The present case belongs to neither of those classes.

Rule discharged (b).

(a) 1 Chit. Stat. 33.

(b) The Court discharged the rule, on the ground that they had no authority to interfere.

The KING v. WHITE.

November 11th.

SIR W. W. FOLLETT in Hilary Term obtained a rule calling upon the defendant to shew cause why an information in the nature of a *quo warranto* should not be exhibited against him, to shew by what authority he claimed to be mayor of the borough of *Sunderland*; on the grounds, first, that *George Stephenson*, who made out the burgess lists, was not town clerk of the borough, nor any person performing duties similar to those of the town clerk; secondly, that the election of councillors of the said borough was held before *Richard Spoor*, who was not mayor nor chief officer of the borough. The affidavits shewed that no royal charter was ever granted to *Sunderland*: that between the twelfth and the sixteenth century it received several charters from the Bishops of *Durham*, who enjoy *jura regalia* within the county palatine: that the last charter was granted by Bishop *Morten*, in the tenth year of *Charles* 1, but that this, together with all the others, was forfeited by disuse: that for centuries there has been no corporation exercising any municipal rule or corporate power within the town; nor within

An information in the nature of a *quo warranto* lies at the instance of a private relator against individuals acting as members of a corporation, although the affidavits on which it is founded go to shew that no such corporation has ever existed.

In Schedule A, 5 & 6 *W.* 4, c. 76, *Sunderland* is mentioned as possessing a public corporation, for the remodelling of which provisions are made by the act. The Court

made a rule absolute for an information in the nature of a *quo warranto*, at the instance of a private relator, against a party acting as mayor under those provisions, although the affidavits in support of the rule went to shew that *Sunderland* did not possess a public corporation at the time of passing the act, and therefore that its provisions could not apply.

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the memory of the inhabitants any mayor, alderman, town clerk, or person exercising similar functions: that in the case of *Hicks v. Clerk* (a), it was held by the Court of *King's Bench*, that *Sunderland* was an ancient borough consisting of twelve capital burgesses called freemen, and twelve inferior burgesses called stallengers, and that a custom was established in favour of such freemen and their widows, but that no such custom has ever been claimed: that there has been for a number of years a body of persons claiming to be a private corporation, under the name of "The Freemen (twelve in number) and Stallengers (eighteen in number) of *Sunderland*," and to be possessed of a large common called *The Town Moor*, as part of their corporate property: that the right of election has been in the freemen only: that there also have been a clerk and a solicitor attached to the body: that this body never had a charter granted to it, nor has it any connection in name, constitution, or privileges, with any of the ancient charters granted to *Sunderland*: that it claims its corporate name and property entirely upon prescription: that until within the last twenty or thirty years the body was not filled up in regular succession: that it never claimed to be any thing more than a private corporation for preserving the succession to this property: that the town, moor, and ports adjacent, are all within the parish of *Sunderland*, which parish does not comprise more than one-third of the parliamentary boundaries of the borough of *Sunderland*, under the Reform Bill Boundaries Act, 2 & 3 Will. 4, c. 64: that this body has never exercised nor claimed any municipal rights, nor any rule nor government over the town: that in 1829 a *quo warranto* was applied for against the freemen and stallengers, to shew by what authority they claimed to be a corporation (b), to which the affidavits filed in answer state, that "the said freemen and stallengers have never interfered, nor is it their corporate duty to interfere in or with the rule or government of the town or borough of *Sunderland*, nor have they exercised or enjoyed, nor claimed to exercise or enjoy, nor do they exercise or enjoy, nor claim to exercise or enjoy, any corporate or other powers, authorities, privileges, or jurisdictions whatsoever within the same town over the rest of the inhabitants, except such control as they possess over such of them as are members or officers of the corporation:" that the Court decided, that as the freemen and stallengers were only a private corporation, and did not exercise any rule or government over the town, and were in no way connected with public government, an information could be brought only by and in the name of the Attorney-General, and therefore discharged the rule: that by the Municipal Reform Act, 5 & 6 Will. 4, c. 76, *Sunderland* was included in Schedule (A), and that the revising barristers divided the town into wards: that the clerk of the freemen and stallengers was applied to to act as town clerk, which he refused to do; upon which Mr. *George Stephenson*, the clerk to the magistrates, (described by the affidavits against the rule as clerk to the corporation,) on the suggestion of the revising barristers, took upon himself to act as town clerk: that the lists were duly published and the burgess roll completed: that a requisition, signed by about one-fourth of the burgesses, was presented to *Bernard Ogden*, the senior freeman, requesting him to act as chief officer, which he declined; and that the two freemen next in seniority also declined, on the ground that they had

(a) 2 Lev. 252.

(b) *Res v. Ogden*, 10 B. & C. 230.

no authority to act : that the requisitionists then applied to *Richard Spoor*, the freeman next in seniority, who assumed the office, against the wish of the other freemen and stallengers, and held the election of councillors, aldermen, and mayor, according to the provisions of the Municipal Reform Act, and that on such election, the defendant, *Andrew White*, was elected mayor : that Mr. *Spoor* was one of the freemen who, on the occasion of the application in 1829, was a party to the affidavit before mentioned.

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Sir *J. Campbell*, A. G., and *Wightman*, now shewed cause.—The party making this application (a private relator) says virtually that there is no corporation in *Sunderland*. The objection that he makes to the election of Mr. *White* is, that the person who acted as mayor could not so act, and that there was no one who could, and that there was no one who could act as town clerk. This objection being against every individual in the corporation, it falls within the rule founded on 9 *Ann.* c. 20, s. 4, that a private relator cannot appear to deny the existence of the whole body ; *Rex v. Carmarthen* (a), *Rex v. Ogden* (b). The objections here are not to the mode of carrying on the election ; they are directed against its being carried on at all. *Rex v. Ogden* shews that the relator is not in a better condition in applying against two or three of a corporation, which he says does not exist, than in applying against the whole of such body. This Court will in no case listen to an application of *quo warranto* by a private relator, which goes to shew that no corporation is in existence. It is only where a corporation can be rectified that this Court will entertain the application ; if the corporation is extinguished, it is the duty of the king's executive government to interfere by the Attorney-General.

Sir *W. W. Follett*, *contrâ*.—The objection against Mr. *White's* filling the office of mayor is, that the machinery required by the Municipal Act did not exist on the occasion of his election. Still it would be difficult to maintain that *Sunderland* is not a borough, since it is ranked as such in the act ; and as no subsequent act relating to *Sunderland* has passed, we must proceed under the present one. Now the act says *Sunderland* shall have a mayor ; therefore, if a person is found acting as such who has no right, the present is the proper application to make. *Rex v. Carmarthen* (a) shews that such an application will not be entertained against the whole of a corporation as a body ; but the same case also shews that the same parties, immediately afterwards, altered their general motion into motions against the several individuals, and obtained their rules. In *Rex v. Ogden* (b), the application was not against an individual, it was against a number of persons, calling on them to shew by what right they claimed to act as a corporate body. That body was of a *private* nature. The application, therefore, was quite different from the present, which is against an *individual* exercising an office in a *public* body ; and there the same Mr. *Spoor*, who acted as chief officer on the occasion of the present elections, made affidavit that the corporation was quite a private affair, not interfering in any way with public matters, and never having done any thing but manage their own concerns. It is perfectly clear that the legislature never intended to insert *Sunderland*, or places similarly circumstanced, in the act. It was put into the act by mistake,

(a) 2 Burr. 869, and 1 W. Bl. 187.

(b) 10 B. & C. 230.

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but being there, we must see whether what the act requires to be done was done, in order to entitle the defendant to hold the office of mayor. If that was not done, no matter for what reason, whether because it was impossible, or for any other reason, he has no title to the office.

LORD DENMAN, C. J.—It appears to me that the case of *Rex v. Ogden* (a) is satisfactorily distinguishable from this. The Court there, with good reason, said that they would not allow an individual to file an information against the members of a corporation whose existence he denied. The Court would not permit a private relator to do that which they said, if proper to be done at all, was the duty of the king's Attorney-General. In *Rex v. Carmarthen* (b), it appears that a *quo warranto* did issue against the individuals, although the Court would not grant one against the whole body of the corporation. Now here the application is as against an individual; therefore the rule acted upon on the former occasion does not apply. With regard to all the facts, whatever we may think of the result, there is doubt enough to make it fit that the question should undergo the consideration of a jury, and therefore the rule must be made absolute.

PATTESON, J.—The case of *Rex v. Ogden* (a) is distinguishable in the way that has been stated. The motion there was not against all the body; it was against five only; but it was for a rule calling upon them to shew cause why a *quo warranto* should not issue against them for acting as a corporation at all; and that was met by their statement, that they had not claimed at any time to exercise any government or municipal authority of any kind or sort. In this case it really comes to the question, whether the circumstance that every one of the supposed members of this corporation being in a similar predicament with the person against whom the motion is now made, (admitting that we know that to be so distinctly on the affidavits,) is a sufficient ground for refusing the *quo warranto*. I do not think we can say that it is. The application is against an individual, and this ground for refusing it is not one which applies to this individual especially or directly. What may turn out to be the facts I do not pretend to know.

WILLIAMS, J.—In all cases where there must be an election, not by a majority, but by distinct integral portions of a corporation, there, if any of the integral parts of a corporation is lost, the corporation is lost. Therefore an objection taken against such integral part affects the existence of the whole corporation, yet a *quo warranto* has repeatedly gone where the objections have been of that description.

COLERIDGE, J.—I am of the same opinion.

Rule absolute.

(a) 10 B. & C. 230.

(b) 2 Burr. 869; 1 W. Bla. 187.

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The KING v. The Justices of MIDDLESEX.

WIGHTMAN, in *Easter Term* last, had obtained a rule calling upon the Justices of *Middlesex* to shew cause why a writ of *certiorari* should not issue, to remove a certain order made by them at a special sessions, for diverting, turning, and stopping up a certain footway, &c. &c., and also an order of the general quarter sessions confirming the first-mentioned order. The order of special sessions was made on the 3rd of *August*, 1835; it was appealed against, and confirmed by an order of quarter sessions, on the 19th of *October*, 1835. On the 29th of *December*, 1835, a certificate was made by two justices that the new footway was complete on the 4th of *January*, 1836; the certificate was inrolled by the Court of Quarter Sessions. The motion for the rule *nisi* was made on the 15th of *April*, 1836.

Sir J. Campbell, A. G. and J. Greenwood, now shewed cause.—By 13 G. 2, c. 18, s. 5, it is enacted, that no *certiorari* shall be granted to remove any conviction, judgment, order, or other proceedings of any justice, &c., unless such *certiorari* shall be applied for within six months next after such conviction, judgment, order, or other proceedings shall have been had or made. Now here the order complained of was made at the special sessions; it is not the confirmation of the order which is complained of. The original order is the grievance, if any. The present application is therefore too late, more than six months having elapsed since the special sessions were held; *Rex v. Boughey (a)*. Next as to the order itself. If there be no valid objection against that, the Court will not grant the *certiorari*. The objection is, that there is a joint order for diverting and stopping. It is said that there must be two, one for diverting, the other for stopping. It must be admitted, that it is laid down by Lord *Tenterden*, that two orders are necessary; *Rex v. Justices of Kent (b)*; if, indeed, he used the language there attributed to him. But if he did, he must have been ignorant of the words of the statute 55 G. 3, c. 68, for both the enacting clause and the form given in the schedule shew that one order is sufficient. The words are, “it may be lawful, by order of such justices at some special sessions, to direct, and to turn, and to stop up such footway,” &c.; and by s. 4, it is only enacted, that the part of the order relative to stopping up shall not be effective till a certificate has been inrolled of the new road having been made. The distinction is, that the order for stopping, and the actual stopping up, must be not *synchronous* but by *sequence* of proceedings. After inrolment of the certificate, all the parts of the order are to be enforced. And s. 3 shews that this is so; for there an appeal is given where any person feels aggrieved by such footway being stopped up and inclosed, and a new highway being appropriated. Now there can be no grievance in the appropriation of a new highway. Therefore it is clear that the act contemplated that one order should embrace both the diverting and the stopping up. This absurdity also would occur if it were necessary to have two orders; that a man might go to great expense in making a new road, and then fail in obtaining an order to stop up the old one. The direction in the schedule also giving the form is “if the order be

November 12th.

1. Where an act of parliament authorised justices to make an order, but provided that such order should have no effect until it had been confirmed and inrolled by the sessions:—*Held*, that the six months within which, under 13 G. 2, c. 18, a *certiorari* to remove it must be applied for, do not begin to run until the order has been confirmed and inrolled.

2. Under 55 G. 3, c. 68, the diversion and the stopping up of a public footway, must each of them be the subject of a distinct order, and one order purporting to be both for the diversion and stopping up, is bad.

(a) 4 T. R. 281.

(b) 10 B. & C. 477.

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for turning, diverting, and stopping up, &c., here so state it, and describe the road ordered to be *turned, diverted, and stopped up*," clearly shewing that one order only was contemplated. The statute 13 G. 3, c. 78, s. 19, also speaks of the *order* to divert, turn, and stop up.

Whiteman, contra.—As to the first point, that this application is too late, *Rex v. Sheppard* (a), recognised in *Rex v. Justices of Kent* (b), shews clearly that it is not. As to the second, the words used by Lord *Tenterden* in the latter case are express, that two orders are necessary. The preamble to 55 G. 3, repealing part of 13 G. 3, recites, that it is expedient that more public notice should be given of any order for diverting, turning, stopping up, and inclosing any highway, &c. It also re-enacts many of the provisions of the latter statutes. In interpreting these enactments, the 18th G. 3, is to be considered as forming part of the 55 G. 3, as appears from Lord *Tenterden's* judgment in *Rex v. Justices of Worcestershire* (c). The 55 G. 3, says, that highways may be diverted and stopped, subject to such restrictions as are enacted in the 13 G. 3, with respect to the widening or diverting highways. To this statute, therefore, we must look, and it contains, as Lord *Tenterden* expressly says, no form for a double order. Moreover, the object of the 55 G. 3, was to increase the facilities for appeal and give more public notice. These objects no doubt are better consulted by the employment of two orders than only one. The 55 G. 3, gives no form of order, only a form of notice, and the words there used are the same as those of the enacting part; and for the interpretation of these last we must look to 13 G. 3, and that statute leads us to suppose that two orders are necessary, which construction is also dictated by public convenience.

LORD DENMAN, C. J.—The first objection as to the time appears to be disposed of by a great variety of cases under various acts of parliament, all referring to the 13 G. 3, and they clearly establish that the period from which the six months are to be calculated, is the time when the sessions confirm the order, not the time when the justices make it. Therefore this application was sufficiently early. On the second point great doubt may be raised as to the intention of the legislature, but when we refer to the act of parliament, I believe that doubt will be removed. The 55 G. 3, c. 68, s. 2, provides for the case. It enacts, that when it shall appear upon the view of any two justices, that any public highway may be diverted so as to make the same nearer or more commodious to the public, and the owner of the lands through which it is to pass shall consent thereto, it shall be lawful, by order of such justices at some special sessions, to divert, turn, and stop up such old highway; and that they are to do by such and the same ways and means, and subject to such conditions in all respects as in the said recited act is mentioned in regard to highways to be widened and diverted. The act recited is the 13 G. 3, c. 78, and we therefore turn to that in order to see how this is to be done. The provisions we find in the 19th section, and in the schedules forms are supplied, one for widening and diverting or turning a way, the other for stopping up. But there is nothing to lead us to suppose that these two acts may be done by one instrument. There is a provision in

(a) 3 B. & A. 414.

(b) 10 B. & C. 477.

(c) 2 B. & A. 228.

55 G. 3, preventing the inclosure of the old road before a certificate has been obtained of the completion of the new one, but there is no substitution of any one order for two separate orders. I think, therefore, that the ways and means to be used must be taken to consist of one order for turning and diverting the old road, and another for stopping up. If there were any doubt, for certainly there is great variety and some confusion in the provisions, I think the authority of Lord *Tenterden*, which is always entitled to very great weight, ought to prevail. This opinion is expressly given in *Rex v. The Justices of Kent*, that the order in that case was bad, inasmuch as the justices had attempted to do by one instrument, that for which the act required two. I am therefore of opinion that this rule must be made absolute.

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PATTESON, J.—With respect to the first question, I think that the *certiorari* having been moved for within six months after the confirmation of the original order, the application was early enough; for, if not, the party would often be deprived of one of those two remedies, one of appeal to the sessions, the other by *certiorari*, to which, by law, he is entitled. If he were obliged to remove the orders made by the justices within six months after they are made, it might happen that he would lose his right of appeal before the case came on in this Court. Although there is no direct authority upon this point, yet there is what amounts to the same thing. In *Rex v. Sheppard* the date of the original order was more than six months before the *certiorari* was moved for; and although that circumstance does not appear to have been referred to, yet we must presume that it was in the consideration of the Court. With respect to the second question, I myself should have thought one order sufficient, because the act says it shall be lawful, by order of such justices, &c. to divert, turn, and stop up, &c., but it also says, that every thing is to be done by the same ways and means, and subject to the same exceptions and conditions as in the recited act mentioned with regard to highways to be widened or diverted. That act is 13 G. 3, c. 78. Now the 19th section has precisely the same words as the 55 G. 3, relative to not stopping up an old way until the new one is made, and a certificate of two justices to that effect has been obtained. I do not know that there is any express direction that there should be two orders, but on turning to the schedule it is plain that two orders were meant to be used. The forms there given shew that two orders are requisite; and as the words used in the 19th section of 13 G. 3, are the same as the words used in this act, and as the forms given in 13 Geo. 3, shew that the words of 13 Geo. 3, must be interpreted to require two orders, therefore we must suppose that two orders are required here. If there was any doubt, the opinion of Lord *Tenterden* would remove it.

WILLIAMS, J.—I am of the same opinion; and with regard to the *certiorari* I shall say nothing. As to the point whether or not one order be sufficient, it is not disputed but that, according to the schedule referred to, two orders were necessary. The question depends now on whether or not the 55 Geo. 3, has in fact repealed the old Highway Act, 13 Geo. 3, so far as regards the necessity for two orders. I own, that had this been free from previous authority, I might have doubted. I find, however, that the case has been decided before, and not merely by Lord *Tenterden*; there is also a

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remark by my brother *Littledale*, which shews that he took the same view of the case. I think, therefore, that unless we were perfectly clear that the decision in *Rex v. The Justices of Kent* was wrong, we ought to abide by and support it.

COLERIDGE, J.—With respect to the first point, I know of no express decision; but it seems to have been assumed in *Rex v. Justices of Sussex (a)*. I myself feel no doubt upon it. The latter order is certainly within the six months; the *certiorari* clearly therefore is not taken away with respect to it. But it is said, that as the former proceeding is beyond six months, the latter, which is only a continuation of it, has now become irremovable. However that might be, supposing the first order could ever of itself have become conclusive, the reasoning cannot apply in the present case. Here the first order is merely a preliminary, and has of itself no force until inrolled and made an order of sessions. It is therefore by the act of the quarter sessions alone that the former order becomes effective. With respect to the second point, I have had great doubt, and if I had referred only to the later statute, 55 *Geo. 3*, I should have thought that the machinery would have worked better if the justices were to consider the propriety of diverting and stopping up the old road at one and the same time, or to make one and the same order for both purposes. With regard to the diversion, no one would think it necessary to appeal against that, because it only could be made by consent of the owners. I should have thought, therefore, one order sufficient. It should rather seem, from the sections to which our attention has been drawn, that one order only was contemplated, directing the diversion and stopping up, the execution of which was to be suspended until the certificate of the two magistrates that the new road is in a fit state for the public to use had been obtained. That provision I can understand if one order only were required, but not if it be necessary to go again before two magistrates, and from them to the sessions, for another order to stop up. However, I do not think we are at liberty to construe the act by consideration of itself only, because we are tied up by references to 13 *Geo. 3*, and the same ways and means are to be adopted as are there provided; these have been pointed out already by my brother *Patteson*, and I entirely assent to what he has said. Moreover, when I recollect that this point has been already under the consideration of the Court, and that Lord *Tenterden* then pronounced his opinion upon it,—a judge, the peculiar quality of whose mind was its extreme accuracy,—I think that even if we felt more doubt on the subject than we do, we ought to bow to his decision.

Rule absolute.

(a) 1 M. & S. 734.

SYMS v. CHAPLIN and others.

King's Bench.

November 15th.

ASSUMPSIT. The declaration stated that the plaintiff delivered a parcel of great value to the defendants, being common carriers, to be conveyed from *Melksham* to *London* and delivered there; in consideration whereof, and of certain reward, defendants undertook, &c. *Breach*, &c. First *plea, non assumpsit*; second, that the plaintiff did not deliver *modo et formâ*; upon both which issue was joined; third, that the parcel was delivered after the passing of statute 1 *Will.* 4, c. 68, and consisted of a certain writing within the meaning of that act, and above 10*l.* in value, and was not delivered at any office &c. of the defendants as common carriers, but delivered to and received by a certain servant of the defendants, and that no declaration was made of the value or nature of the same at the time of delivery, nor was any increased rate of charge, as compensation for the greater risk &c., paid or undertaken to be paid, nor did any person on behalf of the defendants accept any undertaking to pay the same. *Replication, de injuriâ*, and issue joined. At the trial before *Williams, J.* at the last assizes for *Wiltshire*, it was proved that the parcel, directed to *London*, was delivered to *Johnson*, the postmaster at *Bradford*. No directions were given as to the conveyance by which it was to be forwarded, nor was any declaration made as to the value. *Johnson* conveyed it to *Melksham*, a distance of six miles, and received the payment of the carriage for that distance from *Bird*, who keeps an inn there. *Bird* sent it by the defendants' coach, and received from the coachman the amount paid to *Johnson*. *Bird* kept one general book, in which he booked all parcels, and received the money for himself. The defendants' coach had for two years and a half stopped regularly at *Bird's* for the purpose of taking in and delivering parcels. Many other coaches stopped there for the same purpose. The defendants' coach did not change horses there. *Bird* had no express authority to book parcels for the defendants, and neither he nor *Johnson* had any notice stuck up in their offices of the increased rate of charge on parcels above 10*l.* value, pursuant to 11 *Geo.* 4 and 1 *Will.* 4, c. 68, s. 2. The parcel contained a writing, and its value was upwards of 10*l.*, and it was lost. The learned judge told the jury, that if they thought *Bird's* was a receiving-house of the defendants, the plea stating the delivery to a servant was not proved. Verdict for the plaintiff, with leave to move to enter a nonsuit, on the ground that it was immaterial whether *Bird's* was a receiving-house or not, since he being servant to the defendants, and no notice of value proved, the plaintiff was not entitled to recover.

Bompas, Serjt., moved accordingly.—First, the house of *Bird* at *Melksham* was not a receiving-house within the meaning of the Carriers' Act, 11 *Geo.* 4 and 1 *Will.* 4, c. 68. He sends by a great variety of coaches; he has the full option which coach to select for the conveyance of a parcel; he keeps his own booking-book, and receives the money for booking, none of which is paid to the defendants; the defendants' coach merely stops, and nothing is paid by them to *Bird* for his services.—[*Coleridge, J.*—Suppose there is a house where coaches are desired to call, is not that a receiving-house for those coaches?]*—*There is no evidence of

1. A parcel directed to *London* was delivered by the plaintiff to a carrier at *Bradford*; no directions were given him as to the mode of conveyance. He left it at *Melksham*, and many other coaches were in the habit of calling for parcels to be conveyed to *London*. The innkeeper delivered the parcel to the defendants' coachman, who paid him for the carriage from *Bradford* to *Melksham*.—*Held*, that the defendants were liable to the plaintiff, in an action of *assumpsit*, for the loss of the parcel.

2. An inn where a coach regularly stops to receive and deliver parcels, is a receiving-house within the meaning of the Carriers' Act, 11 *G.* 4 and 1 *W.* 4, c. 68, although other coaches stop there for the same purpose, and although the innkeeper keeps but one general booking-book for all the coaches, and uses his own discretion as to the coach by which the parcel is sent.

3. In *assumpsit* against carriers for the loss of a parcel, the defence that the value was above 10*l.*, not declared at the time of delivery, must be specially pleaded.

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any direction to call ; in order to make *Bird's* house a receiving-house it should have been proved that the defendants had authorised or arranged with *Bird* to receive for them.—[Lord *Denman*, C. J.—He received for the defendants when he put the parcel into their guard's hands.]—Then how could the defendants comply with the provisions of the act of parliament ? They would have no authority over *Bird's* office, nor ever any opportunity of demanding an increased rate of charge at the time the parcel was delivered. Therefore the parcel cannot be said to have been delivered at any receiving-house of the defendants within the meaning of the act. The second question is, whether the defendants made any contract with the plaintiff.—[*Coleridge*, J.—You must contend that an action may be brought against the party to whom the parcel was first delivered.]—There is no doubt that such party is liable to an action. The contract made by the plaintiff was with him. There was no connection between the postmaster at *Bradford* and the defendants. The parcel was not particularly directed to go by the defendants' coach ; the postmaster might have sent it by any conveyance that he pleased to *London*. When the parcel came to the hands of *Bird*, he again exercised his own discretion as to the further conveyance of it. It is impossible, therefore, to contend that there is any privity between the plaintiff and the defendants. Lastly, by the first section of the act the value must be declared, otherwise the responsibility of the carrier is not incurred. The defendant may reject that part relating to the servant in the plea, and insist upon the other, that there was no declaration of value. It is a condition precedent that the value shall be declared, and therefore it becomes immaterial whether the parcel was delivered at a receiving-house or not. The act does not constrain carriers to take an increased charge, it only meant that they should be informed of the increased risk that they run. *Owen v. Burnett* (a) shews that the 3d section of the act refers only to cases where the value shall have been declared.—[*Coleridge*, J.—The point in *Owen v. Burnett* turned upon the size of the articles.]—The plea would have been good if it had simply stated there had been no notice of value ; it was suggested at the trial that the allegation of the delivery to the servant was immaterial, and might be struck out ; the learned judge said, every benefit from that should be enjoyed on the motion being made.

Lord DENMAN, C. J.—Upon the point first made, as to whether this was a receiving-house, I can have no doubt. I think the defendants have adopted it as such from use and constant practice, and from directing their coach to stop and call there for parcels ; therefore, upon the first question, being whether this was or was not a receiving-house, I think the jury warranted in coming to a conclusion that it was. Secondly, as to whether the contract was made with the defendants, I think there being a series of agents makes no difference, and that the facts went to shew a contract made with the defendants, as much as if made immediately with them. But whether the plaintiff was bound to declare the value, under all the circumstances, as a condition precedent, is a point of some importance as to the construction of this act, upon which we will take time to consider.

PATTESON, J.—The first point made is, that the innkeeper was not

(a) 2 Crompt. & Mees. 353.

employed by the defendants: but it appears that the innkeeper kept books for booking parcels, and that the defendants' coach had stopped through a space of two years at his house. It did not change horses there, which makes the case stronger, but stopped for the express purpose of taking up parcels. Therefore it is a contradiction to say that he was not the agent of the defendants. That the innkeeper's house was a receiving-house of the defendants, there can therefore be no doubt. With respect to the point made, that the contract was not entered into with the defendants, the evidence shews that *Johnson* undertook to convey, not to *London*, but from *Bradford* to *Melksham* only. There his responsibility as carrier ceases, and he becomes the agent of the plaintiff, for the purpose of delivering the parcel to the defendants' coach that it may be conveyed to *London*. That being so, the defendants by the innkeeper, who clearly for this purpose was their agent, enters into a contract with the plaintiff, as represented by *Johnson*, to convey to *London*. The contract, therefore, between the plaintiff and the defendants is complete.

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COLERIDGE, J.—I am of the same opinion; and taking the facts in the order in which they occurred, there appears no difficulty in the two first points. The plaintiff delivered the parcel to *Johnson* at *Bradford*, who received the carriage upon it, and forwarded it to *Melksham*. There was no contract between the plaintiff and *Johnson* to send to *London*, but merely to take to *Melksham*; and when that was done, the responsibility of *Johnson* ceased. It is proved that the parcel was delivered at a house where the coach had stopped for upwards of two years to take in parcels. These circumstances alone would make the house at *Melksham* a receiving-house. We must understand that the stopping took place upon an arrangement of that kind. But it is said that this is not so, because the innkeeper had the option as to the coach to which he should deliver the parcel, and that therefore he is not an agent of the defendants on this occasion. But as soon as he who is agent has determined by which coach to send, then from that moment he becomes an agent for that coach. We may omit all consideration of the transactions previous to the delivery at *Melksham*, and it can make no difference whether the parcel was delivered there by the plaintiff or by his agent.

WILLIAMS, J.—I thought at the trial, and the jury thought also, that there could be no doubt as to this being a receiving-house. The plain meaning of the words of the statute, applied to the circumstances, removes all difficulty. For two years and a half this house had been *used* for the receipt of parcels; how then can it be contended that it is not one, when the statute expressly says such houses may be deemed to be receiving-houses?

Cur. adv. vult.

Lord DENMAN, C. J. on this day delivered the judgment of the Court.—The declaration stated that the plaintiff delivered to the defendants, as carriers, a parcel to be delivered in *London*, and avers his damage in consequence of their non-delivery. We disposed of all the points upon this motion except one, which was, whether the plaintiff was entitled to recover, he having sent an article of the description, and of more than the value

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stated in the Carriers' Act, without having given notice of the value. The first plea was *non assumpsit*: the second, that the parcel was not delivered *modo et formâ*: the third, that it was delivered, not at a receiving-house of the defendants, but to their servant, without any notice of the value. We have no doubt whatever that the plaintiff is entitled to recover. The jury were of opinion upon the facts, and we are also of opinion, that the parcel was delivered at a receiving-house; and, consistently with the second plea, it may have been received with notice, consequently no defence under that plea was made out. It was also contended that the defendant had made out a good defence under the plea of *non assumpsit*; because, as it appeared in point of fact that there was no notice given, no promise could be implied; and *Owen v. Burnett* (a) was referred to. But that case was before the new rules, and we are of opinion that no such defence can now be set up under the general issue. It was the duty of the defendants, if they intended to rely on that defence, to apprise the plaintiff of their intention by a special plea to that effect.

Rule refused.

(a) 2 Crompt. & Mees. 353.

The KING v. The Inhabitants of HOLBEACH.

November 16th.

The examination of a pauper stated a settlement by hiring and service. The notice of the grounds of appeal set out an exception in the hiring for two days' holiday at *Spalding club feast*:—*Held*, that the appellants could not, under such notice, give evidence of an exception for one day's holiday at *Holbeach fair*.

Semble, that the notice would have been sufficient, although it had contained no mention of the time or place when the holidays were to have been enjoyed.

ON appeal against an order of justices removing *G. H.*, his wife and child, from the parish of *Holbeach*, in the parts of *Holland*, in the county of *Lincoln*, to the parish of *Spalding*, in the same parts and county, the sessions quashed the order, subject to the opinion of the Court of *King's Bench* upon a case, which stated that the grounds of removal, as set forth in the examination of the pauper, were a hiring and service with *J. B.*: that the notice of the grounds of appeal were, that at the time of the pauper hiring himself, he stipulated that he should out of his year's service be allowed to have *two days' holidays at Spalding club feast*, in the month of *July*, and that he was allowed and did take the said two days. At the sessions the pauper proved that he hired himself for one year to *J. B.*, and duly served under that hiring; but upon cross-examination admitted that at the time of hiring himself he bargained for *one day's holiday to go to Holbeach fair*, and that he had such holiday in pursuance of the bargain; but he denied that he made any bargain to have holidays at *Spalding club feast*, and in fact he had not any such holidays. The respondents contended, that as the holiday for *Holbeach fair* formed no part of the grounds of appeal, the appellants could not go into it. The Court of Quarter Sessions, however, being of opinion that they were not precluded from receiving the pauper's evidence of the holiday for *Holbeach fair*, and treating the hiring as exceptive, quashed the order, subject to the opinion of the Court of *King's Bench*, whether, under the circumstances, they were precluded by 4 & 5 *Will. 4*, c. 76, s. 81, from receiving such evidence.

Whateley, in support of the order of sessions.—The question is, whether the notice given by the appellants was not sufficient to enable the appellants to set up the exception relating to *Holbeach fair*. All the object of the statute seems to have been attained; an exception was bargained for with

the master at the time of hiring, as stated in the notice. The attention of the respondents must have been called to the point upon which the appellants relied. Probably, if the notice had merely stated in general terms that the appellants relied upon an exception in the hiring, that would have been sufficient; all that can be urged against them is, that they have gone too far.—[Lord Denman, C. J.—They have not only gone too far, they have mis-stated facts; it is easy to put a case where false matter, though unnecessary, might be introduced for the express purpose of misleading.]—The Court below having been satisfied, it is submitted that this Court will not interfere with their decision.

LORD DENMAN, C. J.—We think it quite clear that we ought to see that the requisitions of the statute are strictly observed. If less had been done it might have been sufficient; but as what is false has been introduced, and the objection was taken at the sessions, we think it better to hold that this notice is insufficient.

PATTESON, WILLIAMS, and COLERIDGE, Js. concurred.

Order of Sessions quashed.

Amos was to have argued against the order of sessions.

The KING v. The Inhabitants of KELVEDON.

ON appeal against an order of justices for removing *James Bird* from the parish of *Kelvedon* in *Essex*, to the parish of *Colsterworth* in *Lincolnshire*, the sessions quashed the order, subject to the opinion of this Court on the following case:—The pauper having, subsequently to *November 1st, 1834*, become chargeable to the parish of *Kelvedon*, an order of magistrates was obtained for his removal to the parish of *Colsterworth* in *Lincolnshire*, and a notice in writing of the pauper's chargeability, accompanied by a copy of the order of removal, and by a copy of the examination upon which the order was made, was sent by the overseers of *Kelvedon* to the overseers of *Colsterworth*. The examination, of which a copy was so sent, was as follows:—

“I was born at *Kelvedon*, in the county where my father then resided, but belonged to the parish of *Colsterworth* in *Lincolnshire*, and continued to belong there till his death, as I have heard and believe; and I have also heard him say that he was a certificated man from the said parish of *Colsterworth* in *Lincolnshire*, &c.”

The overseers of *Colsterworth*, within twenty-one days, gave notice of appeal, and with such notice of appeal sent a statement in writing of the grounds of the appeal as follows:—

“That the father of the said pauper, *James Bird*, never was legally settled in our parish of *Colsterworth*, nor was there ever a certificate granted by our parish of *Colsterworth*, owning the pauper's father to be legally settled in our

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1. A pauper (whose settlement was derivative) stated in his examination before the magistrates who made the order, that his father belonged to the parish of *C.*, as he had heard him say, and also that he had heard him say that he was a certificated man from *C.* :—*Held*, that the respondent parish might give evidence of a settlement gained by the pauper's father in *C.* by apprenticeship.

2. Under 4 & 5 W. 4, c. 76, the respondent parish is not bound to communicate any information relative to the settlement intended to be relied on, other than that contained in the examination.

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parish of *Colsterworth*, as in the examination in this case is stated; and take notice, that at the trial of the appeal we mean to avail ourselves of both or one of the said grounds in support of the said appeal."

At the hearing of the appeal in 1835, the respondents proposed to prove a settlement gained by the pauper's father in the parish of *Colsterworth* by apprenticeship; upon which it was objected by the appellants, that such evidence could not be received, on the ground that the respondents were not at liberty to give evidence of any other grounds of removal than those set forth in the order of removal and examination, and that it was not stated in the order of removal or examination, as a ground of removal, that the pauper's father had acquired a settlement by apprenticeship in the parish of *Colsterworth*. The Court of Quarter Sessions, upon this, decided that the respondents were not at liberty to give evidence of the pauper's father having gained a settlement in the appellant parish by apprenticeship, and quashed the order of removal. If the Court should be of opinion that the respondents were not at liberty to give such evidence, the order of sessions is to be confirmed; otherwise, it is to be quashed, and the appeal is to be sent to the sessions to be heard.

Sir *W. W. Follett*, and *Ryland*, in support of the order of sessions.—The New Poor Law Amendment Act, s. 81, provides that the respondent parish shall not go into or give evidence of any other grounds of removal than those set forth in the examination. The sessions, therefore, did right in refusing to hear evidence of the apprenticeship. There is nothing in the examination which could lead the appellants to suppose that the question to be tried was, whether or not the pauper's father gained a settlement by apprenticeship. They had, therefore, no notice of the intent to prove such a settlement, and they only came prepared to shew that no certificate was granted.—[Lord *Denman*, C. J.—The magistrates ought to set out the full grounds on which the removal was made, but the parish cannot alter the language of the examination.—*Patteson*, J.—The act of parliament does not intend to regulate the language of the examination.]—The intention of the legislature was, that both parties should be informed of the questions to be tried. This examination conveys no information whatever to the appellants, and if it is held that evidence of a kind of settlement not referred to in it may be given, the regulations of the act of parliament will become a nullity.

Knox, (and *Turner* was with him,) *contrà*.—The case of *Rex v. Justices of Cornwall* (a) is a far stronger case than the present, but there is no pretence for alleging any neglect or misconduct in the respondent parish. The act contains no provision that the magistrates shall set out the grounds upon which they made the order in the examination; and all that is required of the respondents is to send copies of the order and of the examination to the appellants. That is admitted to have been done. (He was then stopped by the Court.)

LORD DENMAN, C. J.—The act of parliament might have been more full, it might have imposed upon the respondents the necessity for making a

statement of the grounds upon which they intend to rely at the hearing, as it has upon the appellants, but that is not what the act of parliament has done. It only requires that the respondents should send a copy of the order and examination. And if that was properly conducted in every case, it would be sufficient information for the appellants to act upon. However, that is perhaps scarcely necessary, because the appellants must know the grounds of their own appeal. All then that is thrown upon the respondents to be done, was done. What has been said, amounts to a mere criticism on the manner in which the examination before the magistrates was conducted. It shews no blame attaching to the conduct of the respondents.

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PATTESON, J.—I am of the same opinion. The appellants wish now to make it appear, that the examination led them to believe that the respondent parish only intended to rely upon the circumstance of the pauper's father having received a certificate from the appellant parish. But that is not so, for one of the grounds of appeal was, as appears by the notice, that the father never gained any settlement at all in the appellant parish.

WILLIAMS, J.—We have nothing to do with the question, whether this examination was properly conducted. The examination contains nothing as to the manner in which the pauper's father became settled. A copy of this examination was sent, and the act of parliament so far was complied with. Then did the respondents travel out of the ground of removal set forth in such examination? I think they did not; they gave particular evidence of what is there stated generally. It was not meant that the examination should set out all the facts upon which the respondents may afterwards rely.

COLERIDGE, J.—There is a great difference in the language of the statute with respect to the respondents and appellants. The respondents obtain the order in consequence of an examination which is taken in writing. All they have to do, is to send copies of the order and examination to the appellants. The statute takes care that the appellant shall not be prejudiced, because the removal is not to take place till after twenty-one days' notice, during which time, it is provided, that the appellant parish shall have free access to the pauper, for the purpose of examining him touching his settlement. If then any ambiguity exist in the examination, every facility is given for its removal. But since the grounds of appeal can be known to the appellants only, the act provides that the appellants themselves shall set out these in their notice. This variance between the enactments relating to the two parishes respectively, is accounted for by the difference between the circumstances in which they may stand.

Order of Sessions quashed. The case
to go back to be reheard.

King's Bench.

November 16th.

The rector of a parish sent for *H. S.* on a *Sunday*, and requested him to perform the duty of clerk for that day. He did so, and the rector on coming out of the desk said to him, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals."—*Held*, that *H. S.* was thereby regularly appointed parish clerk, and that by serving the office he gained a settlement.

The KING v. The Inhabitants of BOBBING.

ON appeal against an order of two justices, whereby *Henry Smart* was removed from the parish of *Barming* to the parish of *Bobbing*, both in the county of *Kent*, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—In the year 1811, the offices of parish clerk and sexton of *Barming* became vacant, and the reverend Mr. *Noble*, who was then rector of the parish, sent for the pauper on a *Sunday* in that year, and requested him to perform the duty of clerk for that day. The pauper did so; and Mr. *Noble*, on coming out of the desk, said to the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals." The pauper thereupon, without any thing further being said or done, entered upon the execution of the duties of the said offices, and continued to perform all the duties, and to receive the emoluments of those offices from thence until 1833. Soon after the pauper entered upon the offices as above-mentioned, two of the principal inhabitants objected to what the rector had done, inasmuch as the pauper was not a settled parishioner of *Barming*; but the rector said that the pauper was the fittest person he could find, and that he should therefore persist in what he had done. There was a salary of 1*s.* per week attached to the offices, which had been paid by the parish to the person who had previously filled them, and which the pauper applied for at the end of the first year. The overseer to whom he applied, at first refused to pay him the salary, assigning as a reason that the pauper was not settled in the parish, but the rector having threatened to take legal proceedings against the parish officers, the salary was paid to the pauper by the overseer, and was continued to be paid by the parish to him for four or five years, without any objection on the part of the parish. At the end of that period the pauper applied to the parish for an increase of salary, and the subject having been taken into consideration at a vestry meeting of the parishioners, it was at such vestry meeting agreed to raise the salary to 1*s.* 6*d.* per week, and at this rate the pauper was paid during the remainder of the term he executed the offices. The question for the opinion of the Court is, whether under the above circumstances the pauper gained a settlement in the parish of *Barming*. If so, the order of sessions is to be quashed; if otherwise, to stand confirmed.

D. Pollock, in support of the order of sessions.—The only point to be considered is, whether the pauper was regularly appointed to the office of parish clerk. If he were, and afterwards executed the office, *Rex v. Stogursey* (a) decides that he thereby gained a settlement. But here the case states nothing to shew that an actual appointment ever took place. The words of the rector merely intimate an intention to appoint. Moreover, if there ever were an appointment, still it is altogether invalid, never having been signified to the parishioners, pursuant to the directions of canon 91 (b). That canon provides that "No parish clerk, upon any vacation, shall be chosen within the city of *London* or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being; which choice

(a) 1 B. & Ad. 796.

(b) 3 Burn's Eccl. Law, tit. Parish Clerk.

shall be signified by the said minister, vicar, or parson, to the parishioners, the next *Sunday* following, in the time of divine service."

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Bodkin (and *Deedes* was with him) *contra*.—At all events the appointment by the rector is complete, for the parishioners have no power to interfere with it. (He then, after referring to *Gatton v. Milwich* (*a*), was stopped by the Court.)

LORD DENMAN, C. J.—Here there was a regular appointment, and I much doubt whether the canon does make any mention to the parish necessary.

PATTESON, WILLIAMS, and COLERIDGE, Js. concurred.

Order of Sessions quashed.

(*a*) 2 Salk. 636; *Strange*, 942.

The KING *v.* The Inhabitants of BILLINGHAY.

November 16th.

ON appeal against an order of two justices removing *Lynn* from the parish of *Asterby*, in the parts of *Lindsay*, in the county of *Lincoln*, to the parish of *Billinghay* in the same county, the Court of Quarter Sessions confirmed the order, subject to the following case, which was drawn up by the chairman. The pauper was bound apprentice by indenture, for the term of five years, to *Robert Lund* of *Billinghay*, a wheelwright, and served him at *Billinghay* under these indentures for one year and eight months. The indentures were then cancelled, the pauper's father having bought up the remainder of the time. The pauper afterwards, having first gone upon liking, let himself under a written agreement to *Robert Medley*, of *North Rancely*, wheelwright, which is signed by the pauper's father, *Robert Medley*, and the pauper: it is in the following words:—

Memorandum—"That the undersigned, *Robert Lynn*, agrees on behalf of his son *Robert Lynn*, that he shall serve *Robert Medley*, of *North Rancely*, in his business of a wheelwright, from this time to the 27th *March*, 1830, the said *Robert Medley* paying, at the expiration of the said term, 5*l.* to the said *Robert Lynn* the younger. *Robert Lynn* to find his son clothes, washing, and all other necessaries, and *Robert Medley* meat, drink, and lodging.—Witness our hands this 3rd *December*, 1827.

"*Robert Lynn, Robert Lynn, Robert Medley.*"

The pauper stated, that he served as an apprentice. The respondents proposed to give in evidence conversations between the parties before and at the time of signing the instrument; but the Court refused to admit the evidence. The respondents also proposed to give in evidence the indorsement on the paper within which the agreement was written; but as it was not proved that the indorsement was on the paper at the time the agreement was

1. If the Court of Quarter Sessions send up a case for the opinion of the Court of *K. B.*, and desire to have their order confirmed or quashed, according as the Court shall think their construction of a written instrument right or wrong, but omit to set out sufficient to shew whether their order is on the whole correct or not; the Court of *K. B.* will nevertheless confirm or quash the order, as they think the construction right or wrong.

2. A case sent by the sessions for the opinion of the Court of *K. B.* stated, that at the hearing of an appeal touching the settlement of a pauper, it was proposed to give in evidence conversations between the parties to a written agreement, but did not state what those

conversations were; also that it was proposed to give in evidence an indorsement upon the agreement, but that it was not proved that the indorsement was in existence when the agreement was signed. The question stated for the opinion of the Court was the construction of the agreement. The Court refused to send the case to be restated.

3. *L.* agreed on behalf of his son, that he should serve *M.* from the date of the agreement till a time mentioned, *M.* paying, at the expiration of the said term, 5*l.* to the son. *L.* to find his son clothes, washing, and all other necessaries, and *M.* meat, drink, and lodging:—*Held*, that this was a contract of hiring and service.

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signed, the Court refused to admit the evidence. If the Court of *King's Bench* shall be of opinion, that the agreement was an agreement of hiring and service, the order of sessions is to be quashed; otherwise to be confirmed.

Whateley and *Whitehurst*, in support of the order of sessions.—The questions in this case are, whether the sessions have on the face of the case come to a wrong conclusion. And if so, as they clearly have rejected evidence they ought to have received, the case must be sent down again to the sessions to be reheard.—[*Lord Denman*, C. J.—The sessions do not wish to have our opinion whether a parol contract can be engrafted on a written one, but whether the contract, as stated, was one of hiring and service, or a defective contract of apprenticeship. The evidence offered might, or might not, be admissible, according to circumstances; but we cannot assume that the sessions did wrong, and they do not want our opinion on that point. We must decide on the question they put to us.]—It is apprehended that this Court will decide upon the whole case as it appears stated, and not upon a question put by the sessions; indeed the Court not only will decide upon the whole case as it appears, but they are bound to do so. The Court of Quarter Sessions have no power to put a question to this Court, or to state a case *as a case* for the opinion of this Court. The Court of Quarter Sessions may, if they please, give their reasons in their judgment; it then becomes a special judgment. This Court has a superintending power over all inferior Courts, and can remove their records here. When the record is brought up, of course the special judgment appears on the record, and if it appears that the judgment is not warranted by the special grounds stated in it, this Court will quash that judgment, and indeed are bound to do so, but not otherwise. As these special judgments are generally the facts of the case agreed upon by the parties, common convenience has called them special cases; but this Court can only deal with them as special judgments. Then upon the whole of this special judgment or case, can this Court say the Quarter Sessions must have done wrong? It appears quite clear on this record, that the pauper gained a settlement in the appellant parish, it remained for the appellants to shew a subsequent settlement. It is clear that they have not shewn any. They attempted to do so, by setting up a hiring and service in a third parish under the document in question; but assuming for the moment that this constituted a contract of hiring as a servant, the statute requires another ingredient to confer a settlement, which, upon the face of this case, manifestly never took place—namely, service as a servant. Here it appears that there was no service as a servant, but as an apprentice. Therefore, on the face of the case, it is manifest that the appellants did not prove a good subsequent settlement, and the sessions were consequently right. But at all events, this case must be sent down to be reheard, for the sessions rejected the evidence of what passed, which would have shewn the true nature of the transaction.—[*Coleridge*, J.—We cannot from the case tell whether the evidence was improperly rejected or not, a particular question should have been tendered, and if it had been refused, that might have been brought before the Court.]—Particular questions were tendered and taken down, but the chairman stated the case and omitted them; however, enough appears on the case, though imperfectly stated, to shew that some evidence was improperly rejected. The pauper proved the execution of the document

in question, clearly the respondents were entitled to ask him what took place on that occasion relevant to the execution of the instrument. But it appears by the case that the Court refused to permit any question to be put. A subscribing witness to a deed may surely be asked what passed on the execution of it, and it is for this reason he is required to be called. Then it will be said, such evidence was inadmissible; but though the parties to the contract may be estopped from shewing the transaction to be other than appears, other persons are not. This is clearly proved by several cases; *Rex v. Highnam* (a), *Rex v. Llungunnor* (b), *Rex v. North Wingfield* (c), *Rex v. Cheadle* (d), in which last case this distinction is taken by Lord Tenterden. There are several other cases to the same effect. *Rex v. Laindon* (e), is a case exactly like the present. There is another point in which it appears that the sessions were wrong, namely, in not permitting the whole paper to be read. A party cannot produce part of a document as an account stated, thereby omitting a receipt at the foot of it. There is no case on the subject, but reason and justice require it. As for this indorsement not having been proved to have been written at the time the agreement was signed, it must be assumed to have been so until the contrary appeared. If written at a different time, the onus of proving that lay on the appellants who produced it, not on the respondents who knew nothing of it. Then as to whether this document is a defective contract of apprenticeship, or hiring and service, there are scarcely two cases consistent with each other on the subject. It is in truth a mere matter of fact which the sessions are the proper tribunal to decide. In many cases this Court have said, hiring and service is a mere question of fact with which, though they disagree with the sessions, they will not interfere. Here the sessions have decided this is not a hiring and service, and this Court will not reverse their decision, though it may be of a different opinion.

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G. T. White and Bourne, contra, were stopped by the Court.

LORD DENMAN, C. J.—I do not think that there is any real doubt here; we are bound to deal with the case as we find it. The sessions send us a written document, and ask us to decide whether or not the conclusion they have formed is correct. It is clear that a question of fact is involved when the proceedings between the parties have been by parol, but if every thing depends upon a written document, then the question is one wholly of law, and then I think the sessions may say to this Court, 'We wish to have your opinion on that document.' If that be so, we cannot attend to what has taken place at the sessions, we must look to the instrument only, and see what is the effect of that. I think that it constitutes an agreement of hiring and service; it is a memorandum that the father undertakes on behalf of his son that he shall serve from a certain time, paying 5*l.* &c.; there is not a word said about teaching or apprenticeship; nothing of that sort. We therefore must decide against the view which the sessions have taken. Then it is argued that the sessions themselves shew that they have done wrong, by refusing to hear certain conversations. They state a mere agreement, and the opinion of the pauper as to the character in which he served. In such a case as this, evidence of conversations may be admissible or may not; it

(a) Bott, 501.

(b) 2 B. & Ad. 616.

(c) 1 B. & Ad. 912.

(d) 3 B. & Ad. 833.

(e) 8 T. R. 379.

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would be going a great deal too far to say, that all the witness might have been able to prove as having passed by parol, was receivable. If it is wished to shew that an indenture is fraudulent, then there *must* be extrinsic evidence; but the question with the sessions here was merely as to the effect of the contract. In such a case we cannot look out of the written contract. If, as is suggested, it was meant to be contended that there were circumstances which made the evidence admissible, then the question should have been not as to the effect of the contract, but whether, under the circumstances, it was admissible. But we cannot assume that the sessions have rejected any thing which was properly receivable. As to the construction of the instrument, I think, that on the face of the case their decision was wrong, and the order will therefore be quashed.

PATTESON, J.—The sessions have to determine the law and the fact. But I do not agree that there is no difference between a written instrument and a parol contract. The latter involves a question of fact; but the construction of a written instrument is wholly a matter of law. The sessions have sent this written agreement to us, that they may have our opinion upon it. As to whether they were right in rejecting the evidence, I give no opinion. I do not know what that evidence was, though it seems that it was a conversation. Now, some conversation might be evidence, and a great deal would not. There is nothing to make us think that in the present case it was evidence; the sessions have not told us any thing about it, and we cannot pay attention to, or try to form a conclusion about what might be one thing or might be another. The point as to the indorsement is easily decided. The sessions properly refused to admit that in evidence, because it was not shewn to be in existence at the time when the agreement was made. All then that remains for us to decide is, as to the effect of the instrument itself. I think that the effect was to make a contract of hiring and service, and therefore that the sessions were wrong.

WILLIAMS, J.—I am of the same opinion, upon the ground that the memorandum is in truth the subject which is submitted to our consideration by the sessions. I consider all the rest of the case as being either not before us or disposed of, for I cannot conclude that because the respondents proposed to give evidence of conversations, that therefore they were admissible, although certainly some might have been. In *Rex v. Highnam (a)*, which was the original case as to imperfect contracts of apprenticeship, it was found that the parties did not execute an indenture, because they wanted to save the stamp; that went strongly to shew what was the intention of the parties. But nothing appears in this case to shew that any question, relating to matter properly receivable in evidence, was not allowed to be answered. With regard to the main point submitted to us, I am of opinion that this writing does, upon the whole, purport to be an agreement of hiring and service, and nothing else. The sessions thought otherwise, and, thinking otherwise, have requested to know whether they were right or wrong. I think that they were wrong.

COLERIDGE, J.—I am of the same opinion. I am as averse as any body can be to an interference by this Court with the finding of sessions as to any

(a) Bott, 501.

matter of fact. The sessions sit both as judge and jury; but in every thing in which they sit as judge, this Court has a revising power. They have here submitted to our consideration the effect of an instrument. Now, if the case had been tried at *Nisi Prius*, the judge would have told the jury his construction of that instrument. It cannot be said that the sessions have found the facts conclusively; they find them conditionally, taking a particular view of the construction of the instrument; and it now rests with us to say, whether they have construed it rightly. I agree with the rest of the Court, that they have not construed it rightly. Mr. *Whitehurst* said, that the sessions had found that there was no service as a servant. I think that is not so; they state that the pauper said he served as an apprentice, but it does not follow that his service was in fact of that nature. With regard to the point as to the rejection of evidence, I think, as the case is stated, that we cannot decide the evidence to have been improperly rejected, unless we are prepared to say, that all conversations occurring at the time of execution of the instrument, and that all indorsements are necessarily receivable as evidence. The case is so meagrely stated, that we have no means of forming a judgment upon those points at all. And in the absence of information one way or the other, we cannot assume that the sessions have done wrong. I quite agree with my Lord, that in the case where parol evidence has been received relative to a written instrument, it has never been employed for the purpose of shewing its construction, but only for the purpose, as in *Rex v. North Wingfield* (a), *Rex v. Llangunnor* (b), and *Rex v. Cheadle* (c), of shewing some collateral circumstance not inconsistent with the facts stated in the instrument, or that some fraud was mixed up in the transaction.

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Order of Sessions quashed.

(a) 1 B. &amp; Ad. 912.

(b) 2 B. &amp; Ad. 616.

(c) 3 B. &amp; Ad. 833.

### THE KING v. THE TRUSTEES OF THE GREAT DOVER STREET ROAD.

ON appeal by the trustees of the *Great Dover Street Road* against a rate made upon them for the relief of the poor of the parish of *St. Mary, Newington*, in the county of *Surrey*, the Court of Quarter Sessions confirmed the rate, subject to the opinion of this Court on the following case:—By 49 *Geo. 3*, c. clxxxvi, intituled “An Act for making and maintaining a road from the borough of *Southwark* to the *Kent Road*, in the county of *Surrey*,” after reciting that the making of a broad and commodious communication between the borough of *Southwark*, from near *St. Georges’s* church, to near the *Bricklayer’s Arms* public-house, in the *Kent Road*, would be attended with great advantage, certain persons in the act named were appointed trustees to execute the same, and they and their successors were empowered to receive certain specified tolls, and were directed to apply the monies received under the act towards the payment of the interest of a sum of money advanced by shareholders or subscribers for the purpose of carrying the act into exe-

November 16th.

The provisions of the General Turnpike Acts, 3 *Geo. 4*, c. 126, s. 51, and 4 *Geo. 4*, c. 95, s. 31, which exempt all persons from being rated in respect of any tolls or toll-houses, apply to the trustees of a road made under a local act; although such trustees are beneficially interested in the tolls, and although some of the provisions of the general acts, and of the local act, are inconsistent with each other.



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cution, to the putting of the act into execution, and to the re-payment of the principal sum so advanced. Powers were also given to the trustees, for the purpose of making and improving the road, to treat and agree for the purchase of all the houses and lands along the line of road, and to treat for the loss and damage which the persons interested therein should sustain. Powers were also given to the owners interested in any lands on the line of the intended road to sell them to the trustees.

The 101st section of the act directed that the said trustees should pay to the churchwardens and overseers of the respondent parish such annual sums as at the passing of the act were payable as parochial rates in respect of houses which might be pulled down for the purpose of carrying the act into execution; but it was provided that such payment should cease when and so soon as a sufficient number of houses should be erected and built on the sides of the then intended road, and should be rated on the respondent parish, and the rates thereof should amount to as much as the rates imposed on the houses pulled down for the purpose aforesaid. It was further enacted, that that act, and all the tolls thereby granted, should continue from the passing of the act for the term of twenty-one years. The above-mentioned act was, in certain respects not material to be noticed, amended by an act passed in the 51 *Geo. 3*, c. clxxv.

By a statute (local) 10 *Geo. 4*, c. cxiii, passed on 1st June, 1829, after reciting the passing of the act 49 *Geo. 3*, c. clxxxvi, and 51 *Geo. 3*, c. clxxv, and that the sum of 34,648*l.* 12*s.* 4*d.* of the subscriptions made in pursuance of the provisions of those acts, had been expended for the purposes therein mentioned, but that the amount of tolls received upon the said road had not been sufficient, after defraying the necessary charges of making and maintaining the same, to pay the subscribers in any one instance more than at the rate of 3*l.* 16*s.* per centum per annum, and that the average payments of interest had been less than 3*l.* per centum per annum, so that the trustees had been unable to repay the subscribers; and that for the purpose of enabling the said trustees to continue the payments of interest or dividends to the subscribers, and to repay the several sums subscribed for making the said road, it was expedient that the term granted by the 49 *Geo. 3*, should be further continued, and the said recited acts should be repealed, and other powers granted instead thereof, the said recited acts were declared to be repealed. By the said act (the 10 *Geo. 4*.) certain persons therein named, some of whom were the trustees then in office under the former acts, and their successors, being duly qualified to be elected, as thereafter mentioned, were appointed trustees for putting the act in execution, it being declared, amongst other qualifications, that no person should be capable of being elected, or of acting as a trustee in the execution of the act, unless at the time of acting in his own right, or in the right of his wife, he should be possessed of or entitled to five shares at least in the capital stock raised for making the said road, and in the actual receipt of the interest and dividends thereof.

The act also authorised the trustees to take certain tolls at all the toll-gates, bars, or turnpikes, and toll-houses, then or thereafter to be erected in or upon or across the said road, for horses, cattle, or carriages passing through the same. But it was by the 12th section of the act declared, that the justices of the peace, assembled at the *Easter* quarter sessions for the

county of *Surrey*, should examine the accounts of the trustees, and have the power to order the tolls to cease if it appeared to the justices that the purposes of the act had been carried into effect. And it was further enacted, that all the tolls and monies raised by virtue of the recited acts, and then in the treasurer's hands, and all the tolls and monies to arise thereafter by virtue of the act, should be applied in the first place, and in preference to all other payments, in defraying the expenses of obtaining the act, in continuing, erecting, supporting, and lighting the several toll-gates, bars, turnpikes, toll-houses, and direction posts, to be continued, erected, supported, or lighted, by virtue of the act, and in paying the salaries and allowances to the several clerks, collectors, and other officers and other servants to be employed under the act, and out of the surplus of such payments to pay, until the sums of money subscribed for making the said road should be returned to the persons entitled to receive the same, interest at the rate of 5*l.* per centum per annum, upon all principal sum or sums of money which had been subscribed; and that the trustees should then apply the residue of the monies arising from the said tolls in repaying the several subscribers the monies respectively subscribed towards making the said road, by virtue of the shares in the said road belonging to such subscribers respectively, and for no other use or purpose whatsoever. And it was enacted, that when and so often as the surplus of the tolls applicable to the repayment of any part of the said sum of 34,648*l.* 12*s.* 4*d.* should amount to the sum of 500*l.*, the said trustees, at their next meeting, should proceed to divide by lot to which of the subscribers of and towards the said sum of 34,648*l.* 12*s.* 4*d.* the shares to be paid off should belong. And it was enacted, that so soon as the said sum of 34,648*l.* 12*s.* 4*d.*, subscribed for the making of the said road, should be so paid to the proprietors of the shares of the said undertaking, all tolls on the said road should cease, and the toll-gates, toll-houses, and other erections on the said road erected and set up by the trustees, should forthwith be taken down, and the materials sold, and the money applied to the purposes of the act; and from and immediately after such sale, the powers granted should cease, and the said act should be and become void and of no effect, as if the same had been repealed; provided, that in case the said sum should not be wholly repaid, then the act should continue in force for the term of thirty-one years, and from thence until the end of the then next sessions of parliament, and no longer.

In pursuance of the powers conferred by 49 *Geo.* 3, the trustees appointed under that act obtained conveyances of the lands and buildings along the intended line of the road, of which they took possession, and made and completed *Great Dover Street*, and they erected toll-bars across the same; and they and the present trustees, under the authority of the act, have appointed toll-collectors, through whom they have received the tolls paid at the said gates. In order to complete the road, certain houses were pulled down under the authority of the first-mentioned act; but after the passing thereof, and long prior to the making of the rate appealed against, many new houses were built, and are now standing along the side of the road, and were and are rated to and by the respondent parish, the rates whereof amounted to more money than the rates imposed on the old houses so pulled down.


The former trustees repaired the road, and that part of it which is situated in the parish of *St. Mary, Newington*; but since the act 11 *Geo.* 4, c. xlv, (which was a public act for paving, lighting, cleansing, and otherwise im-

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*King's Bench.* proving such part of *Great Dover Street, Trinity Street, Trinity Square*, and  
  
*The KING* leading out thereof, or abutting thereon, or adjacent thereto, all within the  
*v.* parishes of *St. Mary, Newington, and St. George the Martyr, Southwark*, in  
*The Trustees of* the county of *Surrey*, as do not fall within the powers and provisions of any  
*the GREAT* existing acts of parliament,) the necessary repairs to the roads have been  
*DOVER STREET* done by the commissioners acting under the authority of the last-mentioned  
*ROAD.* act, who have raised the sum of 470*l.* by rates assessed upon the inhabitants  
of the parish occupying premises on the line of the road so repaired: in  
respect to such repairs, the total number of shares subscribed for, and which  
constituted the capital mentioned in the act for making and maintaining the  
said road in question, is 492, of which number 259 shares are held by the  
trustees. The entire amount of tolls ever received has not been sufficient,  
after deducting the necessary expenses, to enable the trustees to pay off any  
part of the capital or principal sum subscribed, or to keep down the amount  
of interest thereon, calculated at the rate of 5*l.* per cent. per annum, but the  
whole of the principle sum is now due. (The case then set out an account,  
which it is not necessary to detail.) The occupiers of rateable property in the  
parish are rated at four-fifths of the average annual value of the proprietors  
in their occupation. The respondents have rated the appellants in the sum  
of 1150*l.* on their total profits for the year ending *December, 1831*, which is  
less than four-fifths of the annual average tolls received by the trustees, after  
deducting the expenses before-mentioned. The appellants resist the rate on  
the following grounds:—

1. That they are not liable to be rated at all, not being the beneficial occupiers of any property within the parish.

2. (a) That they are expressly exempted from liability to be rated, by virtue of the General Turnpike Act, 3 *Geo. 4*, c. 126, and particularly by the 4th and 51st sections of the same act, and by the amended General Turnpike Act, 4 *Geo. 4*, c. 95, and particularly the 31st section of the last-mentioned act.

3. That if liable to be rated at all, they are only liable to be rated in respect of their own shares.

If the Court should be of opinion that the appellants are not liable to be rated at all, the rate is to be quashed. If the Court should be of opinion that the trustees are liable to be rated in respect of four-fifths of the average annual balance received by the trustees during the two years next preceding the making the rate, after deducting the expenses in that behalf before-mentioned, the rate is to be confirmed. If the Court should be of opinion that the trustees are liable to be rated, but only upon the average annual amount of interest paid to or retained by themselves upon their own shares, then the rate is to be amended by reducing the sum at which the appellants are assessed, from the sum of 1150*l.* to the sum of 838*l.* 10*s.* 3*d.*

*Thesiger*, and *M. Chambers*, in support of the order of sessions.—Assuming that these trustees are beneficially interested, they are not exempted from being rated by 3 *Geo. 4*, c. 126, s. 51, (continued by 4 *Geo. 4*, c. 95,) which enacts that no person shall be rated to the poor-rate in respect of any tolls or toll-house. It is true that the provisions of that act are made appli-

(a) As the judgment of the Court proceeded upon this ground only, the arguments of counsel relating to the other grounds are omitted.

cable to any turnpike-road. But it is obvious that the intention was to apply them to those public roads only, where the tolls are taken for the benefit of the public, and not, as here, for the advantage of individuals. In *Rex v. Staffordshire Canal Navigation (a)*, *Lawrence, J.* lays it down, that in the case of a turnpike, tolls are paid for the benefit of the public, not for the use of any individuals, and those tolls are not the subject of taxation within the statute 43 *Eliz.*—[*Patteson, J.*—That argument almost goes the length of shewing that there is no use in the 51st section, because, if the parties were not beneficially interested, they would not be liable to be rated.]—That section was introduced to prevent any question from arising about the occupation of the toll-house. Moreover, it is clear that the legislature did not contemplate the application of the general turnpike acts to the road in question. Many provisions in them are perfectly inconsistent with provisions of the local act. The statute 3 *Geo. 4, c. 126, s. 61*, provides, that all the justices acting for the county through which a road passes, shall become trustees of that road. Sections 62 and 63 require in all such trustees, as qualification, the possession of a certain amount of real or personal property; and section 65 enacts, that no trustee shall act in any matter in which he is interested, nor receive any money out of the tolls, &c. under a penalty. But the local act, 10 *Geo. 4, c. cxiii. s. 3*, provides, that no person shall be capable of acting as trustee unless possessed of five shares at least in the capital stock raised for making the road, and be in receipt of the interest and dividends which arise from the tolls. There are various other provisions relative to mortgages and the taking of land, equally contradictory. It is clear, therefore, that this is not a turnpike-road within the meaning of the general turnpike acts, and therefore the trustees are not exempted from the payment of rates.

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*D. Pollock, Barnwall, and Channell, contra*, were not called on by the Court.

*LORD DENMAN, C. J.*—This case has been ingeniously argued, and inconveniences have been suggested that would arise from the application of the general turnpike acts to the road in question. That may or may not be so; still there can be no doubt but that this, both according to common sense and in strict legal meaning, is a turnpike road. If so, then the clauses exempting all persons from the payment of poors' rates in respect of tolls or toll-houses, must apply to the present trustees. Had there been any difficulty in carrying these clauses into effect, that circumstance might have materially influenced our judgment. But the difficulty can only arise as to the construction and application of other clauses, with which, on the present occasion, we can have nothing to do.

*PATTESON, J.*—I am of the same opinion. It seems to me that the whole question is, whether this is a turnpike road or not. If it is, which no one can doubt, then we must apply to it the provisions of the general turnpike acts, as far and as well as we can.

*WILLIAMS, J.* concurred.

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COLERIDGE, J.—I am of the same opinion. It has been attempted to shew that these trustees are different from other trustees of roads, because they have a beneficial interest in the tolls, and therefore are not exempt from the payment of poors'-rates. But that would not be a necessary consequence supposing them to have such interest. If a mortgagee of tolls bring his action of ejectment, and put himself in possession, no doubt he becomes a beneficial occupier. Still there can be no question but that he would be within both the words and the meaning of the exempting clauses.

Order of Sessions quashed.

### BASTARD v. SMITH and others.

November 25th.

In trespass  
*quare clausum frigit*, two pleas,  
 one of which justifies the trespass  
 under a custom  
 for an unqualified  
 right of entry, the  
 other under a  
 custom for a right  
 of entry subject  
 to compensation,  
 cannot be pleaded  
 together.

**TRESPASS** for breaking and entering certain closes in the county of *Devon*.

*Earle* had obtained a rule calling upon the plaintiff to shew case why the defendants should not have leave to plead the several matters following:—First, justifying the trespasses under a custom for all stanners and tanners in the stannaries, to make trenches in any lands for conveying water to any stannary worked by them, for the better working of the same. Second, The like plea, but alleging the custom to be *on making a reasonable compensation* for the injuries done. Against which,

Sir *W. W. Follett*, and *Montague Smith*, now shewed cause.—The two pleas attempted here to be pleaded, are founded on one and the same principal matter, varied in circumstances only; they set out the same custom, in the one case without, and in the other with, a qualification. The defendant therefore is expressly precluded by the new rules of pleading, *H. T. 4 Will. 4*, from employing them together. Several of the examples given much resemble the present case; that relating to a right of common especially. The act of 3 & 4 *Will. 4*, c. 42, provides that these rules, after they have come into effect, shall operate as if they formed part of the act of parliament when the statute was enacted. The Court therefore have no power to allow the defendant to plead these two pleas; *Jenkins v. Treloar* (a).

*Erle, contra*.—It is said that these pleas set out the same custom, that is not so. These customs are said to have proceeded from royal grants. They may have been founded on two perfectly distinct grants by different kings, one conferring power to go on the land with compensation, the other without. The stannary customs in the district where they prevail, almost resemble the common law.—[*Coleridge, J.*—You must contend that there are two conflicting and yet co-existing customs.]—There is much evidence that would apply to both pleas, and the object has been to avoid the necessity for two trials.

Lord DENMAN, C. J.—This case being expressly within the rule referred to, we have not the power to allow both of these pleas to be pleaded.

PATTESON, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule discharged.

(a) 1 Gale, 360; 1 Mees. & Wels. 16.

The KING v. The Churchwardens and Overseers of  
EDLASTON.

King's Bench.

November 5th.

THIS was an application for a *mandamus*, commanding the defendants to make a rate for the relief of the poor. By the affidavit of *Gadsby*, one of the overseers, it appeared that the parish of *Edlaston* is divided into two districts, one called *Edlaston*, the other *Wyaston*, which repair their roads severally, but that the poor are maintained by the parish at large, who annually appoint two churchwardens and two overseers. At the present time, one churchwarden and one overseer reside in *Edlaston*, and one churchwarden and one overseer in *Wyaston*. On the 10th *August*, a rate being necessary, the churchwarden and overseer residing in *Wyaston* prepared one in the usual form, making no distinction between the occupiers of lands in the two districts; the churchwarden and overseer residing in *Edlaston* refused to concur in that or any other rate, which did not expressly state that certain inclosures, one of which was occupied by *Gadsby*, were situate in *Edlaston*. The churchwarden and overseer residing in *Edlaston* are both tenants of the lord of the manor of *Edlaston*, who claims the inclosures as encroachments on his waste, and they refused to concur by his express directions.

1. The Court will grant a *mandamus* to compel parish officers to make a rate for relief of the poor, where two out of four of those officers refuse to concur in any rate which does not expressly state that certain inclosures are within a certain district in the parish.

2. The rule for such a *mandamus* is absolute in the first instance.

*Greaves*, in support of the application.—The parish officers resident in *Edlaston* have no right to make this admission a condition of their assent to the rate. It might afterwards be employed against the interest of *Wyaston* in questions relating to the highway rates.

The Court (a) having intimated their assent to the application, it was then urged, on the authority of a case moved by *Ludlow*, Serjt., in the Bail Court (b), that the rule must be absolute in the first instance, otherwise the poor would be left unprovided for, pending the rule; and that if the parties had any good cause for resisting it, that might be shewn in the return of the *mandamus*.

Rule absolute in the first instance.

(a) Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) Not reported.

The KING v. The Justices of WARWICKSHIRE.

IN *Hilary* Term, 1835, a writ of *mandamus* to the justices of *Warwickshire* was issued, without opposition on their part, directing them to enforce a conviction, by issuing process. The conviction was thereupon enforced. *Waddington*, in *Michaelmas* Term, 1835, obtained a rule *nisi*, calling upon the justices to shew cause why they should not pay the costs of the application for the writ of *mandamus*, the costs of the writ, and also the costs of the

November 9th.

A *mandamus* issued without opposition to the justices of *W.* directing them to enforce a conviction. A rule *nisi* having been obtained, calling on them to shew

cause why they should not pay the costs of the application for the *mandamus*, of the *mandamus*, and of the rule, the Court held that the circumstance of their not having opposed the application was no ground for subjecting them to costs, and discharged the rule with costs.

*Semble*, that the application should have been made against the individual justices who acted in the matter.

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present motion. Against which, Sir *J. Campbell*, A. G. and *Hoggins*, were to have shewn cause, but the Court called upon

Sir *F. Pollock* (with whom was *Waddington*), to support the rule.—The grounds of this application are, that there was no reasonable cause for putting the parties into the situation which compelled them to apply for the *mandamus*, and the best criterion for shewing that to have been so is, that there was no resistance whatever made to that application.

LORD DENMAN, C. J.—We think those grounds insufficient; the case must be exceedingly strong to put a public judicial body to the payment of costs. Probably also, here the application should have been made against the particular magistrates who acted in the matter.

Sir *J. Campbell*, A. G. then applied for the costs of the application, it having been moved with costs.

*Per Curiam*.—We think the rule must be discharged with costs.

Rule discharged with costs (a).

(a) See the previous case, *Rex v. Justices of Warwickshire*, 1 Har. & Wol. 18.

### THE KING v. TEMPLAR and others.

November 11th.

A *certiorari* does not lie to remove an indictment from the Central Criminal Court, on the ground that difficult points of law will arise on the trial of the case.

C. JONES moved, on behalf of the defendants, for a *certiorari* addressed to the Commissioners of the *Central Criminal Court*, to remove an indictment for a conspiracy. The indictment charged the defendants with conspiring together to defraud the prosecutor of 45*l.*, by passing off upon him an unsound horse as a sound one. It was urged, as grounds for the application, that it was very doubtful, *Rex v. Pywell* (b), whether such an act amounted to an indictable offence; and that the defendants desired to have the assistance of King's counsel. *Templar* alone of the defendants had surrendered.

LORD DENMAN, C. J.—I think that as the other defendants have not surrendered, this application cannot properly be made (c). But however that may be, there is no reason for withdrawing this case from the *Central Criminal Court*, which is fully competent to decide whatever points of law may arise.

PATTESON, WILLIAMS, and COLERIDGE, Js. concurred.

Rule refused.

(b) 1 Stark. 402.

(c) See *Rex v. Hassel*, ante, 321; *Rex v. Jowl*, ante, 375; and *Rex v. Hunt*, 2 Chit. 130.

King's Bench.

## MANNING v. WASDALE.

**C**ASE. The declaration stated that the plaintiff was an inhabitant within the parish of *St. Ives*, in the county of *Huntingdon*, and the occupier of an ancient messuage therein, and by reason thereof was of right entitled to the use, benefit, privilege, and easement of washing and watering his cattle in a certain pond within that parish, and also of taking and using the water of the pond for culinary and other domestic purposes for the more convenient use and enjoyment of the said messuage and premises, at all times of the year, at his free will and pleasure; and that the defendant, while the plaintiff still so inhabited and occupied &c. wrongfully encroached &c. upon the pond by throwing in dirt &c., and thereby disturbed the plaintiff in the use &c. of his said right &c. The second count stated the inhabitancy and occupation, as in the first, and that the plaintiff by reason thereof was entitled to the use &c. of washing and watering his cattle, and of taking and using the water for his domestic and other purposes at all times of the year, at his free will and pleasure (omitting "for the more convenient use and enjoyment of the said messuage and premises"); it also laid the disturbance as proceeding from different causes. To these two counts respectively the defendant in his second and seventh pleas pleaded non-user by the plaintiff or by the owners or occupiers of the said messuage for twenty years preceding, concluding with a verification. To those pleas the plaintiff demurred specially, setting out for causes, that they are respectively and exclusively founded upon an alleged non-user of the easements and privileges mentioned in the declaration for twenty years next before the commencement of this action, which, as such non-user alone for twenty years, is wholly insufficient in itself to destroy, extinguish, or defeat the rights and easements respectively mentioned, prescribed for, and laid claim to in said declaration; and for that those pleas respectively allege mere matter of evidence, which at most would only found a presumption in law of a release, or other conveyance or abandonment, of the right claimed by the declaration; and defendant, if he means to rely upon lapse of time as evidence of a release, destruction, or extinguishment of plaintiff's right to the easements and privileges claimed in the declaration, ought to have distinctly pleaded and averred the legal effect of such evidence. And for that neither of the said pleas respectively alleges, nor doth it by either of them appear, that plaintiff hath at any time submitted to, or acquiesced in any interruption to, or disturbance of, his said rights and privileges mentioned and set forth in the declaration; nor in fact that there ever has been at any time any interruption to the right or title of the plaintiff to the several privileges and easements in the declaration mentioned, nor do the pleas or either of them in any manner deny that the plaintiff has continually asserted and maintained his right, during the whole period of the said twenty years in the pleas respectively mentioned, to the said privileges and easements in the declaration mentioned. And for that it is perfectly consistent with every allegation in the said pleas respectively, that the rights and easements claimed by the declaration continue altogether undisturbed and unaltered. And for that the said second and seventh pleas respectively are argumentative, inconclusive, and in other respects bad in law. *Joinder in demurrer.*

November 18th.

1. A right to take water from the pond of another is a mere easement, and not a *profit à prendre*.

2. *Seemle*, that in an action by the occupier of an ancient messuage for the disturbance of such right, an averment that he was entitled "to wash and water his cattle in a certain pond, and to take and use the water thereof for culinary and other domestic purposes for the more convenient use and enjoyment of the said messuage," would be, on general demurrer, a sufficient restriction of such right, even if it were a *droit à prendre*.



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*Kelly* was to have supported the demurrer, but the Court called upon *Wightman* to support the pleas.

*Wightman*.—The right as here claimed is divisible into two parts, one of which relates to the use of the water for the purpose of washing cattle, the other to the taking of it for culinary and other purposes; as to the latter, the right claimed is laid down in too extensive a manner in the declaration. The plaintiff claims as resident in an ancient messuage, he ought therefore, as far as regards the taking the water for culinary and domestic purposes, to have limited his claim to water to be used for culinary or domestic purposes in the dwelling-house. As the right is claimed here, it might apply to water consumed in other houses.—[*Coleridge*, J.—The water is said to be taken for the more convenient use and enjoyment of the said messuage, &c.]—That is only so in the first count, but it is not a sufficient restriction even there. The use ought to be expressly tied down to purposes in the dwelling-house. It is perfectly consistent with that statement to suppose that the water was consumed in other houses. It may be for the more convenient use and enjoyment of that dwelling-house that the plaintiff should use the water in other dwelling-houses.—[*Patteson*, J.—The words of the declaration are, “taking the water for culinary and other domestic purposes for the more convenient use of the said messuage.” Query, if this is not a mere imperfect averment, of which you cannot now avail yourself?—It is more than an imperfect averment. If the right can be laid in so unlimited a manner, the defendant may be told that no doubt the water was taken for the more convenient enjoyment of the house, but that the plaintiff was not tied down to use it there. In *Corbyson v. Pearson* (a), the objection was not taken till after verdict, but that case goes to shew that the omission of a proper limitation to the right claimed would, if objected to before verdict, have been held bad. The defendant is now entitled to all the advantages he would have enjoyed on general demurrer. Then the right here claimed, at least that part which relates to the *taking* of the water, is a *profit à prendre* in *alieno solo*, and therefore the enjoyment of it cannot be laid in so large a way as to defeat concurrent rights. As the right to water cattle is laid here, the plaintiff might claim under it to water cattle fed in another county, to which he clearly cannot be entitled; *Mellor v. Spateman* (b). In considering the possible results, the extreme cases that may occur may fairly be considered. The plaintiff, in enjoying the right to take water as laid, may use it in all the houses in the town, and so consume all the water in the land. This is like the case of a common of turbary, where the claimant must distinctly restrict his claim to the user for the purposes of the house by which he claims; *Dean and Chapter of Ely v. Warren* (c), *Wilson v. Willes* (d), *Valentine v. Penny* (e).—[*Coleridge*, J.—Is it so clear that this is a *profit à prendre* in *alieno solo*?—The second part of the right claimed is no doubt a *profit à prendre*. The use of water may be an easement, or may be a *profit à prendre*. The use of it for the purposes of sailing on it, or washing in it, is an easement; but the taking of it away and consuming it is a *profit à prendre*. If this had been an easement only, the mode of claiming it might have been correct, for an easement is

(a) Cro. Eliz. 458.

(b) 1 Wms. Saund. 346 f, n. 3; March. 83, pl. 37.

(c) 2 Atkyns, 189.

(d) 7 East, 121.

(e) Noy, 145.

what many may enjoy, because the enjoyment by one does not interfere with that by others; but as it is a *profit à prendre* which must be limited, or it will be destroyed, that limitation must be stated. The distinction is shewn in *Gateward's* case (a).—[*Coleridge, J.*—Have you any authority to shew that the right to take water is a *profit à prendre* in land? The stat. 2 & 3 W. 4, c. 71, s. 1, does not seem to consider it so. Besides, on the face of this declaration I do not see any distinct right in another as the owner of the soil.]—*Primá facie* it must be taken that there is. The plaintiff describes the place as a pond, and it never appears that there is any right in him to the soil.

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*Kelly, contrà.*—If there does exist any want of technical accuracy in the averments, that cannot be taken advantage of now, it should have been the subject of a special demurrer. But if a reasonable construction be put upon them, there is no such inaccuracy; for what purpose can be attained or sought in taking the water for the convenient use of the premises, but by user in the premises? If the mode of wording the claim here can be objected to, the same objection would apply to every claim to the use of a highway. The words used in such cases are always general. It might as well be said there, that because the right is not expressly restricted, the party claims a right to the perpetual use by himself to the exclusion of all others. But it is a mistake to consider the right claimed as a *profit à prendre*. In *Fitch v. Rawling* (b), there is a recital of what things are easements and what *profits à prendre*. There it was the interest of the counsel reciting them to limit the number of easements as much as possible, yet he gives as one instance of an easement, the right to water cattle at a watering place. Yet the water from a well is as liable to be exhausted as the water in a pond. In *Blewitt v. Tregonning* (c), also, this kind of right is cited as an easement. A case tried at Cambridge, *Cross v. Johnson* (d), was to the same effect. There is nothing to shew that this might not be a pond with a stream running into it, and then what is claimed would resolve itself into a mere right to take running water.

*Wightman*, in reply.—*Blewitt v. Tregonning*, decides that no custom can exist to take away sand from the soil of another. That is in favour of what has been already said against the custom attempted to be set up in the declaration, the consequence of it being to exhaust the subject-matter of the enjoyment.

LORD DENMAN, C. J.—It does not appear to me consistent with the ordinary use of language to call the right to take water from a pond, a *profit à prendre*,—a term which seems more properly applicable to some produce of the soil. However, even if such right be a *profit à prendre*, I do not see why it is not properly laid as in the declaration; limited as it there is, we have no reason to assume that there is not sufficient water coming in to feed the reservoir, and more than supply those portions which the plaintiff claims a right to take away.

(a) 6 Rep. 59 b, pl. 37.

5 Nev. &amp; Man. 234.

(b) 2 H. Black. 393.

(d) Reported on other points, 9 B. &amp; C.

(c) 1 Har. &amp; Wol. 431, 2 Ad. &amp; El. 554; 613; 4 Man. &amp; Ryl. 290.

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PATTESON, J.—The inclination of my opinion is, that this is not a *profit à prendre*; but if it were, I doubt whether the objections could be raised on general demurrer. The words in the declaration are, “for the more convenient use and enjoyment of the said messuage.” No doubt these do not strictly confine the use of the water to that messuage only; still, on general demurrer they may be sufficient. Neither does the circumstance that in *Corbyson v. Pearson* (a), the objection was after verdict, make any difference, for the statute 21 Jac. 1, c. 13, which remedies certain defects after verdict was not then in existence.—[*Wightman* then called the attention of the Court to the second count, which did not contain the words “for the more convenient,” &c., and prayed judgment for the defendant on that count.]—We must, therefore, now determine whether this right to take water out of a pond is a *profit à prendre*; and I am of opinion that it is not. I think that the term is not applicable to that which does not arise out of the soil. One instance has occurred to me where a right of this kind might exist in the inhabitants of a parish. Commissioners under inclosure acts are often required to set out a pond to be used by all the inhabitants as a watering place. If that had been done I do not see why an inhabitant might not, in an action against a stranger for filling up the pond, claim his right in the same way as in this declaration. And if it is possible for circumstances to exist under which such a claim would be good, the plaintiff is entitled to call upon us to assume their existence.

WILLIAMS, J.—Admitting Mr. *Wightman's* objection, still I think the first count contains a sufficient and intelligible restriction, at all events upon general demurrer, of the right claimed. As to the second, for the reasons given, I do not think that the right claimed can be considered a *profit à prendre*.

COLERIDGE, J.—My judgment proceeds on a ground that makes it immaterial to consider the difference between the two counts. I think that the right claimed is not a *profit à prendre*, but a mere easement only.

Judgment for the plaintiff.

(a) Cro. Eliz. 458.

### THE KING v. THE INHABITANTS OF MILVERTON.

November 19th.

1. Under 55 Geo. 3, c. 68, the justices have no power to narrow a highway, or to stop up part of it only, or in the same order to stop up more than one highway.

2. An order purporting to stop up part only of a highway, or more than one highway,

**I**NDICTMENT for non-repair of a highway, found at the *Easter Sessions*, 1835, for the county of *Somerset*, removed by *certiorari* into the Court of *King's Bench*. At the Summer Assizes for that county, in the same year, the jury found a special verdict, by which it appeared that the several parts of the highway in the indictment mentioned, called *Blackgrove's Lane*, were out of repair; and before the 25th *February*, 1818, formed part of a public highway leading from the village of *Oak* to the village of *Preston Bowyer*, and thence to the town of *Milcerton*, in the county of *Somerset*. That the whole of the highway mentioned in the indictment was comprised in the order set out; that one part of it was wholly in the parish of *Milcerton*,

and one half of the breadth of the other part in the parish of *Milverton*, the other half of the breadth, in the parish of *Oak*, also in the county of *Somerset*. That on the 25th *February*, 1818, an order was duly made by two justices of the county of *Somerset*, acting within the hundred of *Williton*, in which, after reciting that upon view it appeared to them that a highway in the parish of *Milverton*, called *Cook's Lane*, was unnecessary—and also that another highway called *Blackgrove's Lane*, in the county aforesaid, was unnecessary; the entirety of which last-mentioned highway, between two points mentioned in the order, is situate in the parish of *Milverton*, and one half of the breadth of the same highway, between two points mentioned in the order, is in the parish of *Milverton*, and the other half of the breadth of the same highway, between the two points mentioned in the order, is in the parish of *Oak*, in the same county; and also that a certain other public highway, between two points mentioned in the order, is unnecessary; the entirety of which last-mentioned highway, between two points mentioned in the order, is situate in the parish of *Milverton*; and one half of the breadth of the same highway, between two points mentioned in the order, is in the parish of *Milverton*, and the other half of the breadth between two points mentioned in the order, is situate in the parish of *Fitzhead*, in the county aforesaid—thus proceeded:—"We do hereby order, that the said public highway hereinbefore first described, and stated to be useless and unnecessary, and also the said public highway hereinbefore secondly described and stated to be useless and unnecessary, (except so much and such part thereof as is in the said parish of *Oak*, in the county aforesaid,) and likewise the said public highway hereinafter thirdly described and stated to be useless and unnecessary (except so much and such part thereof as is in the said parish of *Fitzhead*, in the county aforesaid), be stopped up, &c. &c." The verdict also found that the three highways directed to be stopped up by the order, were not connected with each other, but were altogether distinct and separate highways, and at considerable distances from each other. That the highway called *Blackgrove's Lane*, comprehended as well the part of the said highway in the parish of *Oak*, as that in the parish of *Milverton*; that the part stated to be in the parish of *Milverton*, is the same highway as mentioned in the indictment, and that no order by any justices of the peace had been made, whereby the part of *Blackgrove's Lane*, in the parish of *Oak*, had been ordered to be stopped up; that the special sessions, at which orders were made for stopping up roads &c., in *Oak*, were held at *Taunton*, and not at *Milverton*; and that the parish of *Oak* was not within the division for which the justices who made the order acted in *February*, 1818 (a). The first count of the indictment applied to that part only of the road which was wholly in the parish of *Milverton*.

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*F. N. Rogers*, on behalf of the crown.—The order of the magistrates for stopping these highways, was intended to be an exercise of the power first given by 55 *Geo. 3*, c. 68, s. 2. That section refers to 13 *Geo. 3*, c. 78, for the manner in which that power is to be exercised. It is to be the same as is laid down by the last-mentioned statute, in the case of highways which are

(a) The verdict stated other facts, which, as they were not referred to by the judgment

of the Court, have been omitted, together with the arguments of counsel relating to them.

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to be widened or diverted. The statute gives no power to include more than one highway in such order, and where an authority of this nature is given either by a statute or by a private agreement, it must be exercised strictly. Acting on this principle, the Court have recently decided, in *Rex v. Justices of Middlesex* (a), on the authority of *Rex v. Justices of Kent* (b), that where one and the same order provided both for the stopping up and diverting of a road, that such order was bad, because the schedule gives no form for such double order. The practice which has hitherto been pursued is material: the treatise of Mr. Chitty, as well as that of Mr. *Wellbeloved*, says, that where more than one highway is to be stopped, there must be an order for each highway respectively. It is clear also, that no power to stop up two roads by one order existed previously to 5 & 6 Will. 4, c. 50, because the 86th section contains a provision authorising the magistrates, in certain cases only, to do so. This is not a mere formal objection; the intent of the statute 55 Geo. 3, was to give a greater facility of appeal, and a greater degree of publicity; a cumulative order would tend to defeat both of these objects. Indeed, if several roads were included in one order, an appeal would be rendered almost impossible, by reason of the numerous notices which would be required. In *Davison v. Gill* (c), the Court held that an order of magistrates was no answer in a collateral proceeding, because it did not strictly pursue the directions of 13 Geo. 3, and the Court say, that the omission was material and of substance. The second objection is, that the order finds the whole highway to be unnecessary, but only stops up that part of it which is in *Milverton* parish. Here the exercise of their authority by the justices, is duplicate and inconsistent with itself. They have no power to stop up half a road. The justices for each division ought respectively to have viewed the part in their division, and then made a joint order for stopping up the road. Or the justices for one division ought to have stopped up the whole road, which it would seem, from the opinion of Lord Holt, they might have done (d). Or, if this is a *casus omissus*, they must wait till they obtain further authority from the legislature. The consequence of this partial stopping, if it be of any avail, is, that the parish of *Oak* is still bound to repair one half of the road, and *Milverton* is not bound to repair the other half.

*Bere* (and *Carrow* was with him) *contra*.—If it is necessary to have two orders for the purpose of stopping up two distinct highways, the act itself must create that necessity, for certainly no such necessity would exist by any rule drawn from the common law. And at all events, an order which provides for stopping up more roads than one, is not therefore *void*. If a count for murder is joined with one for burglary, the indictment is not necessarily bad, it only affords ground for application to the Court to strike one out. The very indictment in this case is for non-repair of two distinct highways, and yet no doubt it is good. An order of magistrates may be good as to part, though bad as to the other part; *Rex v. Maulden* (e), *Rex v. Cassan* (f). There is no principle, therefore, why an order should not operate upon two distinct highways; it may afford a fair ground for appeal on the

(a) *Ante*, 407.

(b) 10 B. &amp; C. 477.

(c) 1 East, 64.

(d) 19 Vin. Abr. tit. *Statutes*, E. 6, 56.

(e) 2 Man. &amp; Ryl. 146; 8 B. &amp; C. 78.

(f) 3 Dowl. &amp; Ryl. 36.

assumption that the justices have not done what they ought to have done as a matter of discretion, but the order is not therefore absolutely *void*; in matter of law the two questions are quite different. Words infinitely stronger than those used in this statute do not make the acts done *void*, but only *voidable*, upon a proper proceeding being taken to set them aside. The objections here can only arise under and by virtue of the statute 13 *Geo.* 3, c. 78, and there is nothing in that statute to shew expressly how highways are to be stopped up. In section 19, there is a provision for diverting a highway and stopping up the old one; in section 22 the justices are authorised to divert and stop up highways differently circumstanced from those before provided for. This section is now repealed, but attention has been called to it, because in the schedule there is no form given for carrying into effect the provisions of section 22; neither is there any which is applicable precisely to the present case. The Court will not say that the justices ought to have taken an inapplicable form, and attempted to adapt it to purposes for which it was not meant. It is easier and better to construct one, by referring to the whole act. The practice is not, as stated by the other side, to employ a distinct order for each distinct highway, but quite the reverse, as appears in all the cases that have come before the Court. It is true that the *marginal note* to the form given by the schedule of 13 *Geo.* 3, c. 78, says that there should be a separate order where there are more highways than one to be stopped up, and these words exist in the statute roll; but they are only directory. Words far stronger than these, even in the body of a statute, have been held to be directory only, *Gray v. Cookson* (a). So in *Hennah v. Whyman* (b), Parke, B. said, that the form of indorsement on a writ of summons given in the schedule to the Uniformity of Process Act, is only given as an example. Unless a statute in express terms requires compliance with the forms given, it will be considered as only directory. The cases of *Rex v. Bawbergh* (c), and *De Ponthieu v. Pennyfeather* (d) are authorities on that point. So if an order of removal be signed by two justices separately, and in different counties, it is voidable on appeal; but it is not otherwise of itself void, *Rex v. Stotfold* (e). The law which prevails as to settlement cases, throws some light by analogy upon the present. There, in the removal of a mother and her illegitimate child, where they have respectively distinct settlements, the order may be quashed as to one, and confirmed as to the other. The words in the marginal note can only have been introduced by mistake.—[*Patteson, J.*—The statute roll never has a marginal note.]—It is clear this never was intended to have a prohibitory effect, or it never would have been introduced where no one would look for it. In the late statute it is introduced into the body. That was done to give it the force of an enactment, which as a marginal note it did not possess. It is objected that the order recites that the whole road is unnecessary, but stops up only one half; but neither does that make the order void. Largeness of the recital is an advantage rather than an injury to the parties intending to appeal. The justices properly stopped up that part only which lay within their own jurisdiction; they had no power to do more. It is clear that the act considered this case

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(a) 16 East, 13.  
(b) 2 C. M. & R. 239.  
(c) 3 Dowl. & Ryl. 338.

(d) 5 Taunt. 634.  
(e) 4 T. R. 596.

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as analogous to that of a road lying in two counties. That appears from the form No. 16, given in the schedule to 13 Geo. 3. And from the summons, required by section 62, under which the special sessions for the purpose of stopping up the road must be held, it is evident that the legislature meant only the magistrates acting for the division to attend. Such also has ever been the practice.—[*Coleridge, J.*—In this case there has been a virtual stopping up of the part of the road lying in *Oak*; but it does not appear that any notices have been given there. The argument therefore comes to this, that a road may be stopped up without any notices being given.]—That involves a mere question of fact which it is for the sessions to determine. If it could be shewn that the road proposed to be stopped up was useful for the purpose of some other road, that would have been a good ground of appeal against the order; but does not make it void in law. On the other hand, it would be a great hardship to the parties burdened with the repairs of an unnecessary road, if these means did not exist for stopping it up.

LORD DENMAN, C. J.—We are quite clear as to this part of the case, that the power given by the act is to stop up a whole road, and that no power exists to stop up a part only. Where the road lies in two distinct jurisdictions, the justices of those jurisdictions should confer together respecting it, and if they concur in thinking it useless and unnecessary, they may make an order to stop it up.

PATTESON, J.—I am of the same opinion. The language of 55 Geo. 3, is sufficient to shew that this order is void. The power there given to the justices is to stop up a road. In this case they have not stopped up, they have only narrowed a road; and that they have no authority under the act to do.

WILLIAMS, J.—The argument used has been, that if the road be not stopped up in this manner, it cannot be stopped up at all. But that can have no weight unless it be shewn that some means necessarily must exist for stopping it up at all.

COLERIDGE, J.—All power possessed by justices to stop up roads was created by act of parliament. No argument therefore can be drawn from shewing that if not stopped up in this manner, the road cannot be stopped up at all. There often may be good reason for stopping up the whole of a road, which does not apply to stopping up the half. It never could have been intended that parties should remain liable to repair as far as the *medium filum viæ*, and yet not be able to use the road. With respect to the concurrence of the justices in different jurisdictions, great difficulties might arise about obtaining that. I am inclined to think that this is a *casus omissus* in the act.

Judgment for the Crown.

*Bere* afterwards submitted to the Court that their decision referred only to one part of the highway; that of which only one half of the breadth lay in the parish of *Milverton*, and determined nothing as to the other part, which

lay wholly in the parish of *Milverton*, to which solely the first count of the indictment applied.

*Cur. adv. vult.*

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Lord DENMAN, C. J., on the last day of term delivered the judgment of the Court.—The point on which we gave judgment for the Crown applying to one only of the roads indicted, we have since had to consider the case as relating to the other. The prosecutor contended that the order for stopping up the road in question was void, because it stopped up also other roads perfectly distinct from it; and we are of opinion that this objection must prevail. The power to stop up roads is given to justices by statute; it is a power unknown to the common law, and must be executed strictly. The 55 *Geo. 3* enacts, that the ways and means used for stopping up roads shall be the same in all respects as those prescribed by 13 *Geo. 3*, for widening or diverting them. The provisions relative to these means appear in section 16, and in the schedule of that act, Nos. 16, 17, and 18, these and the form of the order No. 18, for stopping up highways, clearly refer to one highway only. The parliament roll itself also contains a marginal note to this form, directing a separate order to be used for each highway intended to be stopped up. This note, since it is found on the parliament roll, must be considered as part of the act, and receive its due weight accordingly. But without it, the language of 55 *Geo. 3*, constantly referring to one highway, one order, one notice, appears sufficiently to shew that the necessary construction of the statute requires a separate order for the stopping up of each individual highway. Of this opinion also was Lord *Kenyon* in *Davison v. Gill* (a), and Lord *Tenterden* in *Rex v. Justices of Kent* (b), which latter decision we recently (c) thought ourselves bound to support.

Judgment for the Crown.

(a) 1 East, 64.

(b) 10 B. & C. 477.

(c) *Rex v. Justices of Middlesex*, ante, 407.

### The KING v. The Inhabitants of the Lower Division of CUMBERWORTH and CUMBERWORTH-HALF.

**I**NDICTMENT for non-repair of a highway. The statute 6 *G. 4*, c. cxxxviii, reciting that the making of a turnpike road, and of several branches in the directions there stated, would be "a great advantage and accommodation to the inhabitants of the manufacturing towns and places in the neighbourhood and to the public at large," provided for the making of such road and branches, and empowered the trustees to erect toll-bars upon any part of the road where they should think proper; but provided, that they should not take from any person passing along the whole line of such roads and branches more than three tolls in the same day. The trustees were also empowered to make two diversions, and the whole line, both trunk and branches, was to be called the *Wakefield and Denby Dale Road*. At the trial before *Parke, J.* at the *Yorkshire Spring Assizes*, 1835, it appeared that the road indicted was part of the main road contemplated by the act, and lay in the district of which the defendants were inhabitants, and that such district was liable by prescription to repair all highways lying within it; it also ap-

*November 22nd.*

An act of parliament empowered certain trustees to make a main road and several branches. They made the main road and all the branches but one:—*Held*, that a district, liable by prescription to repair all highways lying within it, and through which part of the main road passed, was not liable to repair that part until the remaining branch was also completed.



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peared, that one branch contemplated (the *Pikeley* branch) had not been made. The defendants relied upon their not having adopted the road in question, and also upon the non-making of the *Pikeley* branch. Verdict for the crown, with leave to move to set that verdict aside, and enter a verdict of not guilty. In *Easter Term*, 1835, *J. B. Greenwood* obtained a rule *nisi* to that effect, against which,

Cresswell and *J. L. Adolphus* now shewed cause.—It will be contended on the authority of *Rex v. Cumberworth* (a), that this indictment must fail, but that case does not apply. There the main trunk was not completed; and the decision relied on was *Rex v. Hepworth* (b), which was founded on the somewhat exploded doctrine of adoption. Lord *Tenterden* expressed his fears that if the parish were held to be liable before the whole road was made, they might have to repair what was of no use to the public. But his lordship's fears were not warranted, for if a road is of no use to the public, there is no danger that they will adopt it. The better opinion now is, that if the public cannot be excluded from a road, then it is a public road, and the parish must repair it. Such is the case with this road, the public cannot be excluded because the trustees have not done all that was required of them. Suppose an action of trespass brought against a person for passing along this road, merely the circumstance of its being used by the public would furnish him with a sufficient ground of defence.—[*Coleridge, J.*—Who is to give the public the right? Generally these road acts are limited to twenty or thirty years duration. Suppose this time passed without the trustees having complied with the provisions of the statute, how are the public then to obtain a right? *Parke, J.* in *Rex v. Mellor* (c), expresses an opinion that the right would be lost in such a case.]—If the trustees had purchased the ground and laid it open, that would have been a dedication to the public. But here the main road, which is a thing that may be complete in itself without reference to the branches, has been finished. It will be insisted that the whole forms one road; but if so, how is it to be described in an indictment, what are to be considered as the *termini*? It is true that the act so styles it, but that is not a local description, it is only indicative of the district subject-matter over which the trustees are to preside. In *Rex v. Edge Lane* (d) also the main road was not completed, and there, though the non-completion of the branch roads was much urged in the argument of counsel, yet all allusion to that as a ground of their judgment was carefully abstained from by the Court. *Rex v. West Riding of Yorkshire* (e) was decided upon an act of parliament containing particular words, but still the principle is the same as in the present case. There the Court expressed an opinion that the main line upon its completion might become a public road, though the branches were not complete. If the contrary doctrine prevail, the public would not be allowed to use any part of the road before every small branch was completed and every bridge widened pursuant to the statute; because the right to use can only follow and attend the right to have repaired. The performance in all these cases is to be taken distributively; the public may be considered as divisible, and when a portion of work is done, which is beneficial to one

(a) 3 B. & Ad. 108.

(b) Cited in *Rex v. Cumberworth*, 3 B. & Ad. 108.

(c) 1 B. & Ad. 32.

(d) 1 Har. & Wol. 737; 6 Nev. & Man. 81.

(e) 5 B. & Ad. 1003; 3 Nev. & Man. 86.

part of the public, then that part may be considered as dedicated, and the district in which it lies as liable. It may perhaps be contended that the principle laid down in cases of canal companies applies here, but there the object is mere private speculation for the profit of individuals, who are therefore held strictly to the performance of their bargain; *Blakmore v. The Glamorganshire Canal Navigation* (a).—[Lord Denman, C. J.—The trustees of a road are allowed to do certain things on certain conditions; that is much the same principle.]—The object of the trustees of roads is the general benefit of the public, *Bussey v. Storey* (b); therefore an adverse construction cannot fairly be applied to them. It is said that the trustees enter into an undertaking; there is no express undertaking. And in all cases of implied undertakings, reciprocity is the principle by which they are regulated, and that is all that is now asked for. If part of the road has not been completed, as to that part no tolls can be collected; as to the part which has, the trustees have a right to call upon the defendants, who have enjoyed the benefit, to take their share of the *onus*.

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J. B. Greenwood, contra.—The defendants are not liable until every part of the whole line contemplated by the act has been made. The preamble shews that the branches were considered of equal importance with the main road, and the language of the act that the whole was to be considered as one road. This language is to be construed most strictly against the parties applying for and acting under the act, and most favourably towards other parties affected by it. *Blakmore v. Glamorganshire Canal Navigation, Rex v. Greenwich Railway Company* (c). Several provisions of the act go to shew the same thing. If the trustees chose to erect three toll bars upon the main line of road, they might, by the construction contended for, commit a fraud upon the public, because the party paying the three full tolls would not be enabled to enjoy the benefit contemplated, of travelling along the whole line of the roads and branches. The power given to the trustees to make diversions, *if they shall think proper*, shews that where the legislature did intend to leave any thing to the discretion of the trustees, it could use apt words for the purpose. As to the working of the branches, the enactment is peremptory. In *Rex v. West Riding of Yorkshire* (d), the act referred to contained a special clause providing for the opening of the roads contemplated *respectively*, and authorising the granting of a certificate upon their being *respectively* completed. Upon that clause all the arguments of counsel and the observations of the Court proceeded. If such a clause had been introduced here, then no doubt the parts might have been taken distributively. But no such construction can be supported without it. Besides, it is very probable that persons living at the ends of these contemplated branches might have opposed the passing of the act, had they thought that the trustees did not intend to complete them. The construction of the branches might have been the main inducement to their consent to the undertaking, and may have caused its adoption by the legislature.

Lord DENMAN, C. J.—It appears to me that we ought to adhere to the

(a) 1 Mylne & Keene, 164.

(b) 4 B. & Ad. 98; 1 Nev. & Man. 639.

(c) 4 Nev. & Man. 458.

(d) 5 B. & Ad. 1008; 3 Nev. & Man. 86.

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authority of *Rex v. Cumberworth* (a) and *Rex v. Edge Lane* (b). No doubt very strong distinctions may be drawn between cases where what has been left undone forms part of the main road, and there has been an adoption by public user, and where it forms one of the branches only. But we should create much inconvenience if we were to enter into inquiries upon such points. I think it is sufficient to say, and in this the authorities support me, that it is by virtue of their whole undertaking the trustees have become possessed of their powers, and they are to execute that undertaking entirely, before they call upon the parish to repair the road made. In this case the whole main road was completed; in the former case of *Rex v. Cumberworth* (a) there was a part of that unfinished, but there was the same adoption and user of what was done in the former cases as here, therefore the mere adoption and user by the public in those cases would have been as good to make them liable as the user by the public or the parish in this. We cannot distinguish of course between the number and importance of the branches that have been done and those undone. If any part is left undone, we must consider the whole as imperfect. I think therefore we are bound to say that the verdict for the crown must be set aside, and a verdict entered for the defendants.

PATTESON, J.—I am of the same opinion. We must adhere to the principle of former cases. I am afraid of entering into inquiries as to the distinctions between one case and another. In all these local acts there is a species of bargain, the trustees undertaking on their part to make all the roads. If therefore they neglect to do so, we are bound to say that they have not completed their contract. That is the principle of *Rex v. Cumberworth* (a), and it applies to this case. And though our decision may be inconvenient to many persons, we cannot help that; we should create much litigation if we were to inquire into the existence of those distinctions in the manner that has been suggested.

WILLIAMS, J.—I am of the same opinion, upon the principle of the authorities referred to. In this particular case the completion of the whole line, with all its branches, must be considered as a condition precedent to the liability to repair the road in question. It is impossible to say on what terms parties have been induced to permit the line of road to pass through their lands. I cannot say that they did not abstain from offering any resistance to the passing of this act, because of some additional benefit which they expected to derive from the completion of the branches.

COLERIDGE, J.—I am of the same opinion. The arguments on behalf of the crown were very specious, and at first sight seemed to present a great distinction between this and the former cases; but when I asked myself what right the trustees had in this case to burden the parish with repairs of this road, or what right to take the land from the landowners, I could not find any principle to support such distinctions. The only way to answer those questions is, to consider the circumstances under which this act of parliament was obtained. It is virtually, as in all these cases, a bargain by the trustees on

(a) 3 B. & Ad. 108.

(b) 1 Har. & Wol. 737; 6 Nev. & Man. 81.

one side, and the legislature on behalf of the public on the other; the trustees being entitled to take the land and enjoy certain powers on condition of their performing certain undertakings. According to the distinction attempted to be drawn, the main line of road being completed, the trustees have in this case done enough to entitle themselves to take away the land from the owners and to burden the defendants with the repair of that line. But why may not the branches have been the sole consideration for allowing the main road to be made? The new line may have been desirable only on their account, and persons, owners of land in the parish through which this line went, may have made no opposition to the passing of the acts simply because the trustees undertook to make or improve these branches. It is not at all impossible that such was the case. I cannot therefore lay down as a principle that which possibly would work great injustice. The bargain was to execute the whole of this undertaking, and until the trustees have executed every part of that whole, they cannot become entitled to throw any burden upon the public, or any part of the public.

Rule absolute.

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ASSUMPSIT against the defendant as the acceptor of certain bills of exchange. *Plea*, that after the accepting of the said several bills of exchange, and after the time for the payment thereof had elapsed, to wit, &c., the defendant, being at that time resident in that part of the united kingdom called *Scotland*, and subject to the laws thereof, in consideration that certain persons being or supposed to be creditors of the defendant should forbear to sue or molest the defendant in respect of any debt, monies, or claims, before and at that time due or supposed to be due and owing to them, or any of them, from the defendant, made his certain deed or writing; by which said deed or writing, duly stamped and attested according to the law of *Scotland*, and shewn to the Court here, the defendant did alienate, assign, dispose, convey, and make over to and in favour of *J. D.*, and to such person or persons as might be thereafter appointed by his creditors as trustees, to and for the use of his said creditors in the said deed mentioned, and of other creditors whom the said trustees should assume into the benefit of the said disposition, all and sundry his moveable goods, &c., debts owing to him, and other effects, and in general the whole moveable estate presently appertaining and belonging to him, and of whatsoever nature and denomination, situated within the kingdom of *Scotland*, together with the lease of his dwelling-house at *Cleminster*, to and in favour of the said trustees, and of such other person or persons as might thereafter be appointed by his said creditors, as trustees as aforesaid, whom he did thereby surrogate and substitute in his full right and place thereof, in lieu of and in full satisfaction and discharge of all the said debts, monies, and claims, due from him or payable to the

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Assumpsit against the defendant as acceptor of certain bills of exchange. *Plea*, that after the bills were accepted and became due, the defendant, resident in and subject to the laws of *Scotland*, in consideration that his creditors should forbear to sue, by his deed, made according to the law of *Scotland*, assigned his personal property within *Scotland* to *J. D.*, for the use of his creditors; that notice of this deed was given to the plaintiff; that the plaintiff appointed by a writing, valid according to the law of *Scotland*, *H. R.* as his attorney to concur in the deed and receive dividends; that *H. R.* did concur and act therein; that

other creditors accepted the assignment in satisfaction of their debts; that since the assignment funds have become available under it sufficient to pay all the creditors; that all the proceedings were in conformity with the law of *Scotland*: by reason of which premises, and the effect of those laws, the defendant has become discharged of the causes of action. *Replication*, that the defendant has not become discharged *modo et forma*:—*Held*, first, that by this replication the law of *Scotland* was put in issue; secondly, that the plea did not disclose a defence at *English* law.

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said creditors by the defendant; and that notice of the execution of the said deed or instrument of disposition was given to divers persons, being or supposed to be creditors of the said defendant, as well in *Scotland* as also in *England*, and among the rest to the plaintiff, who, by his writing, signed by him, and which said writing was by the law of *Scotland* valid and effectual in that behalf, did nominate and appoint one *H. R.* as the attorney of the plaintiff on that behalf, and as such attorney, authorised and empowered him to concur in and adopt the said deed, and to receive the dividends which might or should become due by or in respect of property, by virtue of the said assignment; and that the said *H. R.*, by virtue and in pursuance of such nomination, appointment and authority as aforesaid, did nominate and appoint and adopt the said deed, and the provisions thereof, for and on behalf of the said plaintiff, and did act thereon as the authorised agent of the said plaintiff, and was appointed one of the committee chosen by the said creditors for the payment and distribution of the estate and effects of the said defendant, and attended meetings of the creditors under the said deed, and voted and acted as the representative of the said plaintiff in the matters thereof in that behalf; that divers other persons, being creditors of the defendant, to wit, &c., in consideration of the execution of such assignment of the goods, &c. of the defendant, as aforesaid, did agree to accept the assignment of the goods, &c. of the defendant, and did accept the same in lieu of and in full satisfaction of their respective debts and claims; and that from the time of executing the said trust-deed by the said defendant, and the adoption thereof by the plaintiff as aforesaid, the defendant hath not at any time accepted any other bill or bills of exchange, drawn upon him by the said plaintiff, and that the plaintiff has no cause of action or demand whatsoever against the said defendant, except the supposed causes of action in the declaration mentioned, and which said several causes of action accrued before the execution of the deed by the defendant, and the adoption thereof by the plaintiff, as aforesaid; and that since the executing of the said trust-deed, as aforesaid, by the said defendant, and the adoption thereof by the said plaintiff, as aforesaid, certain funds, goods, and chattels, of the said defendant, of the value of 2000*l.* and upwards, have become available under the trust-deed for the benefit of the creditors of the defendant, and for the benefit (among others) of the plaintiff; and that the said sum of 2000*l.*, so made available as aforesaid, is sufficient to pay and discharge all the debts of the said defendant in the said deed mentioned, and among the rest the debt of the said plaintiff; and that all and singular the proceedings aforesaid were pursuant to and in conformity with the laws of *Scotland* aforesaid, whereby, and by reason of the said several premises, and by effect of the aforesaid laws, the said defendant hath become absolutely discharged in respect of his person, lands, goods, and chattels, from the several causes of action in the said declaration mentioned.

*Replication*, that the defendant has not become, nor is discharged, in respect of his person, lands, goods, &c., from the several causes of action in the declaration mentioned, nor any of them, nor any part thereof, in manner and form as the defendant has thereof in his plea alleged.

Conclusion to the country, upon which issue was joined.

At the trial before Lord *Denman*, C. J. at the *Middlesex* Sittings after *Hilary* Term, 1835, the defendant contended that no fact was put in issue by

the replication, and that therefore he was entitled to a verdict upon the pleadings. He offered no evidence. The plaintiff contended that evidence should have been given of what was the law of *Scotland*. His lordship directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to set that verdict aside and enter a verdict for the plaintiff; and in *Easter* term, 1835, a rule *nisi* was obtained; against which

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*Erle* and *Sewell* now shewed cause.—The plea contains a statement of several facts, from which an inference of law was to be drawn, with an averment at the end, that the defendant was thereby discharged. The replication having passed by all these facts without putting them in issue, and merely averring that the defendant was not thereby discharged, amounts merely to a species of general demurrer. The *Scotch* law is only averred in the plea so far as relates to the validity of the execution of the deed. If the plaintiff had intended to dispute that, he should have replied *de injuriâ*, and then the defendant might have come down to trial prepared to prove it. But in truth, the averment in the plea would have been just as good if all the statement about the laws of *Scotland* had been struck out. The facts disclosed amount to a discharge under the *English* law also. After an agreement such as it is admitted has been entered into, the party who has come in under it cannot afterwards bring any action even by the *English* law. If he could, he would thereby commit a double fraud, one against the debtor, who, by the agreement, has been placed in a worse situation than he was before; *Butler v. Rhodes* (a), *Brady v. Sheil* (b), *Heathcote v. Crookshanks* (c), *Seager v. Billington* (d); and the other against the creditors who have entered into the agreement; *Steinman v. Magnus* (e), *Wood v. Roberts* (f), *Oughton v. Trotter* (g). The other side will contend that the replication traverses the facts stated in the plea, and that the discharge by the *Scotch* law is a material fact put in issue. But that is not so; unless it appears that the *virtute cujus* contain a mixed matter of law and fact, it is not traversable; *Lucas v. Nockells* (h). It is laid down by *Bayley, J.* and *Littledale, J.* in that case, that where those words introduce a consequence or inference of law from the preceding matter, they are not traversable, though the preceding matter is. However, here the plea is complete without it, and the facts admitted by the replication amount to a good defence at *English* law. The defendant is therefore entitled to judgment.

*Smirke*, (and *Peacock* was with him,) *contra*.—The replication amounts to and involves a denial of a material issuable fact averred by the plea. If the issue raised had been only as to what was the *Scotch* law, still that would have been a proper question for the jury. But, in truth, it involves a mixed question; first, whether the *Scotch* law is such as it is averred to be; secondly, whether, supposing it to be so, the defendant is therefore entitled to his discharge in this action. But suppose all the statements about the *Scotch* law were struck off the plea, as proposed by the other side, then there remains nothing which amounts to a defence under the *English* law. There

(a) 1 Esp. 236.

(b) 1 Camp. 147.

(c) 2 T. R. 24.

(d) 5 C. &amp; P. 456.

(e) 11 East, 390.

(f) 2 Stark. 417.

(g) 2 Nev. &amp; Man. 71.

(h) 10 Bing. 157.

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is nothing to shew a release by the plaintiff, nor an executed accord and satisfaction; nothing which could be sued on by the law of *England*; nothing put in place of the cause of action lost. (He was then stopped by the Court.)

LORD DENMAN, C. J.—There is no doubt but that by this replication the law of *Scotland* is put in issue. Part of the traverse is a traverse of the law of *Scotland*. But then it has been argued, that it is of no consequence whether or not issue has been joined upon the law of *Scotland*, because enough appears upon the plea to constitute a good defence under the *English* law. But that is not so. It does not appear that any thing has been done, which, under the *English* law, would prevent the plaintiff or any other creditor from suing the defendant for his debt. A verdict, therefore, must be entered for the plaintiff.

PATTESON, J.—This is an application to enter a verdict for the defendant. It is quite clear that the *Scotch* law is put in issue by the pleadings in this action, and the *Scotch* law being matter of evidence, the defendant was certainly bound to produce some. He did not produce any, and the plaintiff is therefore entitled to the verdict. But it has been said that we may reject all that part of the plea relating to *Scotch* law as unnecessary, and that enough remains to shew a good defence under the *English* law. I doubt if that could be done after a traverse such as the present. But even if it could, I think the plea shews no defence under the *English* law. It states—(here his lordship read part of the plea.) Now we have no such law as this in *England*; many of these terms have no meaning that we can recognise; they therefore necessarily must, in order to make them intelligible, be referred to the *Scotch* law, which may be traversed, and has been traversed here, and has not been proved. There is nothing here which shews that the plaintiff had done any thing to injure or defraud either the defendant or any other creditor. Nothing on the face of the plea can be held to amount to a good defence at *English* law.

WILLIAMS, J. and COLERIDGE, J. concurred.

Rule absolute.

### The KING v. The Overseers of WESTOWE.

November 24th.

At the hearing of an appeal against an order of removal, the appellants, at the instance of the respondents, produced an assignment of the pauper as apprentice to a master in the appellant parish, but objected to its being given in evidence by the respondents, as it was not stamped. The Court of Quarter Sessions respite the appeal, that the respondents might apply to the Court of *King's Bench* for a *mandamus* to the respondents to produce the assignment to be stamped:—*Held*, that the instrument was not a document of a public nature, and no *mandamus* would lie.

CRESSWELL, on behalf of the overseers of *Scarborough*, had obtained a rule calling upon the overseers of *Westowe* to shew cause why a *mandamus* should not issue to them to produce at the Stamp Office to be stamped, the assignment indorsed on an indenture of apprenticeship, under which a pauper had been assigned and served in *Westowe*. It appeared that *Westowe* had appealed against an order removing the pauper from *Scarborough*. At the hearing, the respondents required the appellants to produce the assignment, which they did, but objected to its being read in evidence, on the ground of not being stamped. The Court allowed the objection,

as it was not stamped. The Court of Quarter Sessions respite the appeal, that the respondents might apply to the Court of *King's Bench* for a *mandamus* to the respondents to produce the assignment to be stamped:—*Held*, that the instrument was not a document of a public nature, and no *mandamus* would lie.

but respited the appeal, to afford the respondents an opportunity of making this application.

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v.  
The Overseers  
of Westow.

*Bliss*, now shewed cause.—The present is not analogous either to those cases where the Court orders the inspection of an instrument in the hands of a third party, or where it directs one of the parties in a cause to produce an instrument for the purpose of being stamped. In the first case, a *mandamus* for inspection only lies at the instance of some one of those persons for whose use the instrument is kept; *The Mayor of Southampton v. Graves* (a). Such was the ground of Lord *Tenterden's* judgment in *Rex v. Bishop of Ely* (b), where he distinguishes a bishop's register from parish books, which he says are kept for the use of the parishioners only. And certainly no one has a right to inspect them who claims adversely to the parish, *Cox v. Copping* (c), *Rex v. Smallpiece* (d). But these parties are adverse and also strangers to the parish of *Westow*. If this application prevails as against parish officers, it must prevail also as against individuals; and a party may be compelled to produce the conveyance or demise of an estate, if it happens to affect the settlement of a pauper. Neither would the Court order this instrument to be produced, even if a cause were pending between the parishes of *Westow* and *Scarborough*. Three things must concur before the Court will interfere. The party applying must be a party either actually or in interest to the instrument: the action pending must be on the instrument itself: and the party holding, must either actually or impliedly hold as a trustee to produce; *Ratcliffe v. Bleasby* (e), *Street v. Brown* (f), *Lawrence v. Hooker* (g), *Cocks v. Nash* (h), *Travis v. Collins* (i); none of these requisites exist here. The instrument is between third and fourth parties; *Scarborough* has no interest in it, for the interest must be one of title, not of convenience; must be in the instrument itself, not arising from it in consequence of some wholly collateral matter, such as the service here. This case therefore does not resemble that of *Bateman v. Phillips* (k), where the reason given by *Mansfield*, C. J., for the interference of the Court, was, that "the plaintiffs were as much parties to the paper as if they had signed it." The question in dispute also is upon a matter collateral to the instrument. Lastly, admitting that the overseers do hold as trustees, still it must be shewn that they hold as trustees for *Scarborough*. The Court will not act on the mere ground that the party holding is a trustee. This principle is laid down by *Alderson*, J. in *Cocks v. Nash* (h).

*Cresswell*, *contra*.—The question is, whether the overseers of *Westow* have a right, for their own private advantage, to withhold this instrument to the injury of other parties. No other way exists by which that injury can be redressed but by writ of *mandamus*; the Court will therefore grant it. It has been said, that the Court will not interfere unless a cause is pending between the parties, but that is not so, *Rex v. Bishop of Ely* (b). And here the instrument is held in trust for, among others, the party making this applica-

(a) 8 T. R. 590.

(b) 8 B. & C. 112; 2 Man. & Ry. 127.

(c) 1 Lord Raym. 337; 5 Mod. 395.

(d) 2 Chit. R. 288.

(e) 3 Bing. 148.

(f) 6 Taunt. 302.

(g) 5 Bing. 6.

(h) 9 Bing. 723.

(i) 2 C. & J. 625.

(k) 4 Taunt. 157.



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of WESTOWE.

tion. When the legislature has determined that parties shall gain a settlement in a particular manner, that settlement becomes a public question, and all persons are interested in the inspection of instruments relative to it. The overseers of *Westowe* had no right to possess themselves of this instrument ; but having done so, they hold it as trustees for every one who has occasion to inspect it. Inspection was refused in *The Mayor of Southampton v. Graves (a)*, on the ground that the instrument in question was a muniment of title ; no such reason exists here. This is not a muniment of title, no one can be injured by its production, and if withheld, great injustice will be done.

LORD DENMAN, C. J.—This rule must be discharged. Mr. *Cresswell* was obliged to rest his argument on the ground that this is a document of a public nature ; but that is a character which certainly it does not possess.

PATTESON, J.—The authorities which have been cited chiefly relate to cases where parties have claimed a right to inspection on the ground of possessing an interest in the document. Those authorities abundantly shew that the inhabitants of *Scarborough* have no such interest as to entitle them to call for the production of this assignment. Mr. *Cresswell* was therefore obliged to rest his claim on the ground that this is a public document ; but no such ground exists. It cannot be said, that the public are interested in the inspection of it, therefore no injustice will be done to them by withholding the instrument. It cannot signify to the public at large, how or where a pauper is settled.

WILLIAMS, J. concurred.

Rule discharged.

(a) 8 T. R. 590.

### DOE *d.* POOLE and another *v.* ERRINGTON.

November 24th.

A defendant gave due notice to the attorney for the plaintiff to produce a certain document. At the trial the attorney attended, and then for the first time stated that the document was not in his possession, whereupon the defendant was unable to prove his case, and the plaintiff obtained a verdict. Upon a motion for a new trial the plaintiff's affidavits stated facts which, if proved, were an answer to the defendant's case, even if the document had been produced. The defendant's affidavits stated he had a good defence on the merits. The Court granted a new trial.

**EJECTMENT**, tried before *Parke*, B. at the Summer Assizes held *July* 28th, at *Newcastle*. The lessors of the plaintiff claimed as devisees under the will of *William Ord*. The defendant proposed to shew that *William Ord* had only an estate for life, and that the defendant was his heir. The lessors and their attorney lived seventeen miles from *Newcastle*, and, three days before the trial, the defendant gave them notice to produce certain indentures of lease and release, necessary to shew his title. They then gave no information where the deeds were. The clerk to the attorney of the lessors attended at the trial, and then proved that the deeds in question had been sent two months before the trial to *London*, for the purpose of a Chancery suit. The learned judge refused to receive secondary evidence of the deeds, and directed a verdict for the plaintiff, giving leave to the defendant to move for a new trial. Upon affidavits of these facts, and that upon application being made *July* 30th, to the agent in *London* of the attorney for the lessor of the plaintiff, he stated that the deeds were not in his possession,

were an answer to the defendant's case, even if the document had been produced. The defendant's affidavits stated he had a good defence on the merits. The Court granted a new trial.

and also that the defendant had a good defence upon the merits. *Cresswell* King's Bench.  
having obtained a rule *nisi*,  
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Coltman, Ingham, and Wightman, now shewed cause against the rule, upon affidavits stating, that part of the land in question was conveyed by the indentures under the trusts of the will of one *Elizabeth Armstrong*, and that by virtue of them *William Ord* entered upon such part, and also entered upon all other lands that *Elizabeth Armstrong* died possessed of, and remained in possession of them till his death, *November 1832*. That on his death, there being doubts as to whether *William Ord* had an estate for life or in fee, and as to whether or not the defendant was, as he stated, his heir, an arrangement was made to divide the property in equal moieties between the defendants and the lessors of the plaintiff. That in pursuance of such arrangement, the defendant was let into possession of all the land in question, but afterwards declined to complete the arrangement. That the lessors of the plaintiff are now prepared to shew that the defendant has no claim whatever to any of the property; and that at the trial the defendant offered no evidence of title to that part of the land not comprised within the indentures.—It is contrary to the practice of the Court to allow a party who has got into possession under an arrangement, to contest the title of the party admitting him, till he has put such party into the same situation as he was in before the arrangement; *Doe v. Baytop (a)*. That case was determined on the ground that a tenant shall not be allowed to dispute his landlord's title; but here the same principle applies. Here the defendant has got into possession under an arrangement which has never been fulfilled.—[*Lord Denman, C. J.*—That would have been a good case for you at the trial.]—The indentures not being produced, a reference to it became unnecessary. It is now offered in answer to this motion. It was impossible to produce the indentures at the trial. Under the circumstances the party has no claim to the indulgence of the Court, he should be put to his ejectment.

Cresswell.—There was no suggestion of the existence of this arrangement at the trial; the case was decided wholly on the ground of the non-production of the deeds, and his lordship said, that he should not give possession until after this motion was made. The affidavits on the other side do not swear that the lessors of the plaintiff are not in possession of the full moiety of the land. The behaviour of the lessors was most deceptive. When applied to for the deeds, they allowed the defendant to go to trial, under the full persuasion that they would be produced. Had the defendant been duly informed he might have applied to have the trial postponed.

Per Curiam (b).—We are of opinion, that under the circumstances this rule must be made absolute.

Rule absolute.

(a) 1 Har. & Wol. 270; 3 Ad. & El. 188. (b) *Lord Denman, C. J. Patteson, & Williams, Js.*

King's Bench.

The KING v. EVE and PARLBY.

November 24th.

A rule *nisi* for a criminal information was discharged, upon the affidavit of a person swearing to the truth of the libel. Upon subsequent affidavits shewing the entire falsehood of the former affidavit, that the person making it had been indicted for perjury, a true bill had been found, and that he had absconded, the Court re-opened the rule which had been discharged, and made it absolute.

IN *Easter Term* a rule *nisi* had been obtained for a criminal information against the defendants, the printer and proprietor of the *Satirist* newspaper, for certain statements which appeared in that paper relative to a Mr. *Digby*. The statements charged him, among other things, with cheating at cards. That rule was afterwards discharged, upon the affidavit of a person named *Shepherd*, who swore that he was personally acquainted with Mr. *Digby*, had been an eye-witness of the conduct imputed, and had himself been cheated at cards by Mr. *Digby*.

Sir *J. Campbell*, A. G. in this term applied for a rule *nisi*, calling upon the defendants to shew cause why the rule, which had been before discharged, should not now be re-opened. The application was supported by affidavits shewing, that upon an interview being obtained between Mr. *Digby* and *Shepherd*, the latter avowed himself to be wholly unacquainted with Mr. *Digby*, and that, upon being examined upon cross-interrogatories, he had contradicted his affidavit in every particular, denying that he had ever known Mr. *Digby*, or ever made an affidavit in opposition to the rule for a criminal information. The affidavits also stated that *Shepherd* had been indicted for perjury, a true bill had been found, and he had absconded; and that the affidavit of *Shepherd* was in the handwriting of a person connected with the *Satirist*, and that he had formerly lived in the employ of a person connected with that paper. There was also an affidavit by Mr. *Digby* denying the conduct imputed to him, and stating that he had never used unfair play upon any occasion whatever. There were also various affidavits establishing the honour and integrity of Mr. *Digby's* character. The Court granted the rule, at the same time intimating that the affidavit shewing the connexion of *Shepherd* with the defendants, though very proper, was unnecessary.

Thesiger and *Kelly* now shewed cause against the rule.—Parties will not be allowed to renew their application on affidavits simply contradicting facts before established to the satisfaction of the Court. And even admitting the falsehood of *Shepherd's* affidavit, still the Court will not re-open this rule, unless the defendants are clearly shewn to be connected with him, so as to become participators in his fraud. It is a settled practice that no rule, especially in a criminal matter, will be re-opened, unless it has before been defeated by the fraud or falsehood of the defendants themselves. That is not shewn to be the case here. If the Court refuse the application, Mr. *Digby* may still, if he pleases, proceed by indictment.

R. V. Richards, on behalf of *Eve*, read an affidavit stating that he had, long before the publication of the libel, ceased to be the printer of the *Satirist*.

Lord DENMAN, C. J. (without hearing Sir *J. Campbell*, A. G., with whom were *Wightman* and *J. W. Smith*, at length.)—We are extremely jealous of doing any thing upon the simple ground that the former affidavits were un-

true. Such a course would lead to an inquiry by affidavits upon affidavits, inconvenient in itself, and for which this Court is wholly unsuited. But the circumstances of this case are so very peculiar, so unlikely to recur, that we do not think we are establishing a precedent that will be injurious. Here a person, calumniated in the grossest manner, comes and successfully vindicates himself from all imputation; the rule which he obtains is then met by an affidavit of *Shepherd*, who says that the prosecutor has actually cheated him personally at cards. It is therefore discharged. Upon further inquiry it now appears, that though there is a person of the name of *Shepherd*, he has falsely sworn to his having had any opportunity of knowing these facts, even if they ever did exist. Upon this, these defendants are called upon to shew cause why the rule should not be re-opened, and in the meantime the person calumniated has preferred an indictment for perjury against *Shepherd*, who has absconded. In answer, the defendants do not say that they had any other information to induce them to believe that their statement was true. They merely say, that a person who used the name of *Shepherd* came and told it to them, and they afterwards obtained his affidavits stating that Mr. *Digby* had cheated him at cards. The statement must surely be considered as one made by themselves. They acted upon it; they inserted it in their paper upon the authority of a person who has since made an affidavit entirely false. It seems to me therefore that this rule having been discharged on that affidavit, there is ground enough for us to say, that Mr. *Digby* should be placed in the same situation in which he would have been if that affidavit had not been produced.

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Rule absolute (a).

(a) See *Taylor v. Slings*, ante, 327.

DOE d. BURGESS and another v. THOMPSON.

EJECTMENT for freehold and copyhold lands in the county of *Cambridge*, tried before *Tindal*, C. J. at the last assizes, when the following facts were proved:—

In 1786, *William Thompson* became possessed of the property in question.

1807, *James*, son and heir at law to *William*, was put into possession of the lands by his father on the occasion of his marriage, and continued in the occupation of them till 1831, when he died, upon which, first his widow, and then his son and heir at law, the defendant, entered.

1833, *William Thompson* made his will, devising "all his lands" to the lessors of the plaintiff, in trust to sell the same, and died in the same year.

They sold the copyhold lands to *S. T.*, who was immediately admitted.

1836, in *April*, *S. T.* made a conditional surrender to them.

1836, in *July*, they were admitted "at a special Court of *Joseph*, Lord Bishop of *Ely*, v. Lord of the Manor of *Ely Barton*, before *Hugh Evans*, steward of the said manor." It was objected that the bishop was not then confirmed in the see, but no evidence was offered in support of the objection, and it was overruled. Verdict for the lessors of the plaintiff, and the jury

November 24th.

Where an admission to a copyhold is made in pursuance of a surrender, or what by statute is equivalent thereto, and not as or in consequence of a voluntary grant by the lord, the lord's title is immaterial.

Where there has been a continued possession of lands for 20 years, but not adverse, s. 15 of 3 & 4 IV. 4, c. 27, enables a party claiming, to bring an action within five years after the passing of that statute.

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and another

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Thompson.

found specially that *James Thompson* had held the lands for upwards of twenty years, but had not held adversely to *William Thompson*.

Gunning, on a previous day, moved to set aside the verdict, and enter a nonsuit, or for a new trial, supported by an affidavit stating that *Dr. Sparkes*, the former Bishop of *Ely*, having died *April*, 1836, *Dr. Joseph Allen* was translated to that see, but was not confirmed in it, nor were the temporalities granted to him till the 19th of *August* in that year.—The temporalities of a bishopric during vacancy belong to the crown (a). In *July*, 1836, the bishop had therefore no authority to hold a Court. As to the copyholds, therefore, the lessors of the plaintiff failed to shew a title (b). And by 3 & 4 *Will.* 4, c. 27, ss. 2, 7, they are barred from claiming any part of this property, twenty years having elapsed since there was any right to make entry upon the lands, and the tenancy, if such was the nature of the occupation, never having been determined. And these sections are not controlled by s. 15, which provides, that where the possession is not adverse, an action may be brought within five years after the passing of the act. That section does not apply to the case of a tenancy at will. At all events, the defendant under the circumstances could not be treated as a trespasser. No notice had been given, or demand of possession made, and the devise was no determination of the tenancy (c).

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court (d).—A nonsuit or new trial was moved for in this case on several grounds, none of which we think tenable. With respect to the admission of improper evidence, it appeared on affidavit that the lessors of the plaintiff, who claimed as devisees under the will of one *William Thompson*, had been admitted at a Court held by the steward of the manor, as steward and in the name of the present bishop, before any grant to him of the temporalities of the see of *Ely*, the copyhold land in question being holden of a manor which was parcel of the see. We are of opinion, that as the admission of the plaintiffs was made in pursuance of a surrender, or what by statute is equivalent thereto, and not as, or in consequence of, a voluntary grant by the lord, that the lord's title was immaterial. It was contended also, that under 3 & 4 *Will.* 4, c. 27, the continued possession for twenty years by *James Thompson*, during the lifetime of *William Thompson*, barred the lessors of the plaintiff, who were the devisees of *William Thompson*. But the jury have found that the possession of *James Thompson* was not adverse to *William Thompson* the testator, and as the present action is brought within five years after the passing of the statute 3 & 4 *Will.* 4, c. 27, the proviso in the 15th section of that statute saves the right of the lessors of the plaintiff.

Rule refused.

(a) Burn's Eccl. Law, tit. Bishop, vi.

(b) Coke's Copyholder, 154.

(c) Co. Litt. 55 b, Com. Dig. Estate, (H 6.)

(d) Lord Denman, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

BALLANTYNE v. TAYLOR.

November 24th.

HUMFREY had obtained a rule *nisi* for the defendant's costs in this action, pursuant to 43 *Gco.* 3, c. 46, s. 3, on affidavits stating the defendant's arrest for 20*l.* 2*s.* 1*d.*, and that no bill of particulars had been delivered before the arrest for a greater amount than 9*l.* 9*s.* 9*d.*, of which 5*l.* 15*s.* 3*d.* had been paid on account: that the defendant did not, at the commencement of the suit, owe nor has since owed the plaintiff 20*l.*: that the plaintiff obtained a verdict at the trial before Lord Denman, C. J. at the sittings in London after last term, for 10*l.* After the action was brought, a bill of particulars amounting to 25*l.* 17*s.* 4*d.* was delivered, in which credit was given for 5*l.* 15*s.* 3*d.* The *Pleas* were payment and infancy. *Replication* to the latter, that the articles were necessaries. The affidavits in answer stated that the defendant had received all the goods, but that the delivery of some of them having been by the plaintiff himself, could not be proved at the trial; that the defendant failed to establish his defence; that the judge certified that the cause was a proper one to be tried before him. They also set out a letter from the defendant to the plaintiff ending thus:—"I intended to have made some arrangements; but if you think you can recover the bills by law, you had better try it. I never meant to have robbed you of one farthing." And stated that the plaintiff in consequence of that letter, believing that the defendant intended to act dishonestly, directed the arrest for 20*l.* 2*s.* 1*d.* the amount due.

The defendant was arrested for 20*l.* 2*s.* 1*d.* for goods sold and delivered. *Plea*, infancy. *Replication*, that the goods were necessaries. Verdict for 10*l.* the price of the goods proved to have been delivered. The affidavit of the defendant stated that he never owed 20*l.*, the affidavit of the plaintiff, that goods to the amount of upwards of 20*l.* had been delivered, and that the judge certified that the cause was a proper one to be tried before him:—*Held*, that the defendant was entitled to his costs under 43 *G.* 3, c. 46.

Sir F. Pollock and Swann now shewed cause.—The question is, whether there is reasonable ground to believe that 20*l.* was the worth of the articles delivered. The defendant is not entitled to costs unless he makes it appear that there was a want of reasonable or probable cause for the arrest; and the onus of shewing this rests on the defendant; *Hall v. Forgit* (a), *Twiss v. Osborne* (b). The meaning of the defendant's affidavit may be, that he did not owe more than 19*l.* 11*s.* 11*d.*, and that, not because he ever had the goods, but because the plaintiff could not prove the delivery before the jury. He does not venture to state that any one article has not been delivered or been unfairly charged. On a motion for costs under this statute, the Court is not guided by the amount of the verdict; *Graham v. Beaumont* (c).

Kelly, contra, was stopped.

LORD DENMAN, C. J.—It has been always held, that the amount of damages is a *prima facie* ground from which to presume the presence or absence of reasonable and probable cause for the arrest. The sum here claimed was only just enough to entitle the plaintiff to arrest. He seems to have wound himself up to make an affidavit covering the exact money. Though there is conduct on the part of the defendant of which I cannot approve, yet I see nothing here to induce us to depart from the principle which governs these cases.

(a) 1 Dowl. P. C. 696.

(c) 5 Dowl. P. C. 49.

(b) 1 Har. & Wol. 274, n; 4 Dowl. P. C. 107.

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PATTESON, J.—People should understand what a risk they run in arresting a party when the debt just amounts to 20*l*.

WILLIAMS, J. concurred.

Rule absolute.

OHRLY and another v. DUNBAR.

November 25th.

Sixty actions having been brought upon a policy of insurance, a consolidation rule was entered into, by which the plaintiff and defendants agreed to be bound by the verdict in one of them. The verdict in that action was found for the plaintiff; but a rule *nisi* was obtained by the defendant for a new trial.

The plaintiff then, on the ground that by reason of the arrears of business in the Court, the rule for a new trial could not come on for a long period, and that during that time the plaintiff lost the advantage of the interest, and incurred great risk as to the principal, obtained a rule *nisi* for the defendants to pay the whole amount insured into Court, or invest it as the Court should direct.

The Court discharged the rule.

THE plaintiffs in this case brought sixty actions against the underwriters (some of whom were large companies, some individuals,) of six policies of insurance on the ship *Pylades*, to the amount of 27,000*l*. A consolidation rule had been obtained on the behalf of the defendants, and the verdicts in the other actions were to be determined by the verdict in the present, provided it were to the satisfaction of the judge before whom the cause was tried. Subsequently the cause was tried before Lord Denman, C. J., and a verdict was found for the plaintiff; but the defendant having obtained a rule *nisi* for a new trial, which was yet pending, the plaintiff—on affidavits, stating that from the great arrear of business the rule for a new trial could not be decided for a long period of time: that two underwriters were already dead: that there was danger of others dying or becoming insolvent, and that the plaintiffs, at all events, lost the advantage of the interest on the sum insured—obtained a rule calling upon the defendants to shew cause why the amount for which the plaintiff was insured should not be paid into Court or invested according to the direction of the Court. The rule *nisi* for a new trial had been obtained, on the ground that the verdict was against evidence.

Sir J. Campbell, A. G., and Maule, now shewed cause.—The defendants, after all the circumstances of the case were brought before the notice of the Court, obtained the rule for a new trial unconditionally. The plaintiff now, without those circumstances being varied, seeks to impose conditions. The case of *Rickman v. Carstairs* (a) is different from the present; here the defendants wholly deny their responsibility; they insist that there has been a gross misrepresentation. On the second trial, the jury may, if they see fit, give the plaintiff interest for the time elapsed between the trials. Therefore, if this application were acceded to, it would be withdrawing from the jury, to whom it properly belongs, the discretion of giving or withholding interest. All that the defendants get by the consolidation rule is a stay of proceedings; they are bound by the verdict in one action, if the judge approves of it. Not so the plaintiffs; they may proceed in all the other actions if dissatisfied with the verdict in the first. The plaintiffs have suggested that the defendants may die or become insolvent, but that is an argument that might be used in every case; at all events, there is no danger on that ground with respect to the sum insured at the great offices.

Sir W. W. Follett, and Alexander, *contrà*.—This is a case under peculiar circumstances; here the plaintiffs are bound by the consolidation rule, which

(a) 2 Nev. & Man. 562.

was applied for by the defendants themselves. The words of it are, on submission of the *plaintiffs and defendants* to be bound by the verdict.—[*Patteson*, J.—Then this is different from the ordinary consolidation rule.]—It is so. If the rule for a new trial is discharged, the plaintiffs will be losers of interest to the amount of 1500*l*. This is not a case in which, under the recent statute, interest can be given by the jury. It is true there is no danger, from death or insolvency, as to the sums insured in the great offices, and the plaintiff is willing that the rule as to that part should be discharged.

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LORD DENMAN, C. J.—The remarkable circumstances of this case induced the Court to allow the question to be discussed. But we are all most decidedly of opinion that we should add materially to the delay in transacting the business of this Court if we made this rule absolute. Were we to do so, every party having a rule for a new trial in the paper, would, under the peculiar circumstances of his case, come and make similar application. We also think that no reference should be made to what may be the existing state of business in the Court.

PATTESON, J.—I am entirely of the same opinion. I do not see that any thing arising out of the consolidation rule bears on the question; the delay is not occasioned by that; because, if all the sixty causes had been tried, there would be sixty rules for new trials.

WILLIAMS, J. and COLERIDGE, J. concurred.

Rule discharged.

The KING v. The Mayor and Assessors of HYTHE.

UPON the revision of the burgess lists of *Hythe* by the mayor and two assessors, *October*, 1836, pursuant to 5 & 6 *Will.* 4, c. 76, s. 18, it was objected, that *W. A.* and certain others, not having paid the shilling required by 2 *Will.* 4, c. 45, s. 56, were therefore disqualified. The mayor and one of the assessors, being of that opinion, struck out their names. Upon affidavits stating these facts, and also that the parties possessed the qualification required by 5 & 6 *Will.* 4, c. 76, s. 9,

November 25th.

Certain burgesses who possessed the qualification required by 5 & 6 *W.* 4, c. 76, s. 9, were objected to at the revision of the lists before the mayor and assessors, because they had not paid the shilling required by 2 *W.* 4, c. 45, s. 56, and their names were thereupon expunged:—*Held*, that a *mandamus* does not lie for the insertion of the names.

Sir *W. W. Follett* now moved for a *mandamus* to the mayor and assessors to insert the names on the burgess roll.—The payment of the shilling is no part of the qualification required by 5 & 6 *Will.* 4, c. 76. These parties have therefore a good inchoate right, and have no other remedy. The Court will therefore grant this writ pursuant to the practice followed before the passing of 5 & 6 *Will.* 4.

The Court (*a*), after referring to the circumstance that the mayor and

(*a*) Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

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assessors who acted were now out of office (a), and to the provisions of sections 18, 19, and 22 (b), refused the rule.

Rule refused.

(a) By sect. 49, the election of mayor takes place on the 9th November, annually.

(b) Sect. 18 provides, that a Court for revising the lists shall be held between October 1st and October 15th, and that the mayor shall insert no name unless notice has been previously given.

Sect. 19. That at such Court the mayor

shall write his initials against the names inserted.

Sect. 22. That the mayor shall deliver the lists to the town clerk, who, before October 22d, shall copy them into a book, which book, for the year ensuing, from November 1st inclusive, shall be the burgess-roll.

PEACOCK v. HARRIS.

November 25th.

A plaintiff having obtained a verdict, a new trial was afterwards granted, the rule being silent as to costs. Notice of trial was given by the plaintiff. Before the time of trial came on the defendant withdrew his pleas, and judgment went by default:—*Held*, that the plaintiff was not entitled to the costs of the trial.

THE plaintiff in this case having obtained a verdict, a new trial was afterwards granted, on the ground of the improper reception of evidence. Nothing was said about costs. Notice of trial having been given by the plaintiff, the defendant, before the time of trial, withdrew all his pleas, and judgment went by default. The Master, upon his taxation, allowed the plaintiff the costs of the first trial. A rule having been obtained for the Master to review his taxation,

Jervis now shewed cause.—In *Booth v. Atherton* (c), where, after argument on a special case, the Court directed a new trial, because the case was insufficiently stated, and in *Jackson v. Hallam* (d), where after verdict for the plaintiff a new trial was granted, and the defendants gave cognovits without going to trial, they were held liable to the costs of the first trials. In this case the defendant's conduct amounts to the same thing as giving a cognovit. It is an admission that he never had any ground of defence to the action. The rule of *H. T. 2 Will. 4*, r. 64, does not apply to cases like the present. The object of it was to assimilate the practice of the Courts where a new trial actually takes place.—[*Coleridge, J.*—*Gray v. Cox* (e) is later than *Jackson v. Hallam* (d). There, after verdict for the plaintiff, and a new trial granted, the plaintiff discontinued. It was held that the defendant was not entitled to the costs of the trial.]—There the verdict on the first trial was against him. In *Sweeting v. Halse* (f), where it was for the defendant, he was, after new trial granted and a discontinuance by the plaintiff, allowed the costs.

R. V. Richards, contra.—The cases where there has been a discontinuance are not applicable. The party who discontinues must accept that indulgence on the terms imposed by the Court. Before the new rules, the granting of these costs was mere matter of practice varying in the different Courts. But the rule *H. T. 2 Will. 4*, r. 64, is quite express, that if no mention is made of costs in the rule, the costs of the first trial shall not be allowed to the party succeeding, even though he succeed on the second; and the construction of this rule is quite established; *Newberry v. Colvin* (g), *Porter v. Cooper* (h).

(c) 6 T. R. 144.

(d) 2 B. & A. 317.

(e) 5 B. & C. 458.

(f) 9 B. & C. 369.]

(g) 2 Dowl. P. C. 415.

(h) 1 Gale, 149; 2 C. M. & R. 232.

Per Curiam (a).—This case falls within the rule, and therefore we have no power to grant costs.

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Rule absolute (b).

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(a) Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(b) See *Seally v. Powis*, 1 Har. & Wol. 118.

HARRIS.

IN ERROR IN THE EXCHEQUER CHAMBER.

Before TINDAL, C. J., Lord ABINGER, C. B., PARK, J., GASELEE, J., VAUGHAN, J., BOSANQUET, J., BOLLAND, B., ALDERSON, B., and GURNEY, B.

CAMPBELL, Clerk, and others, v. MAUND.

Exch. Cham.

November 1st.

TRESPASS in the *King's Bench* against the plaintiffs in error, for assaulting the defendant in error, and turning him out of the vestry-room of the parish of *Paddington*, he being one of the churchwardens. The plaintiffs in error were the perpetual curate of the parish, one of the churchwardens (*Hill*), and the beadle. They pleaded a justification, on account of *Maund* being neither churchwarden nor a vestryman. *Replication, de injuriâ*, on which issue was joined. The cause was tried before Lord Denman, C. J. at the sittings in *London* after *Michaelmas* term, 1835, and the assault was proved. It was proved on the part of *Maund*, that there was a local act, 5 *Geo. 4*, c. cxxvi, regulating the parish of *Paddington*, by the 10th section of which it was enacted, that the election of churchwardens should take place on *Easter Tuesday*, and should "be conducted from year to year in such manner as hath been usual in the same parish." It was also proved, that long before and since the passing of the statute 58 *Geo. 3*, c. 69, (*Sturges Bourne's Act*), the mode of electing of churchwardens in the parish of *Paddington* had been by show of hands, no poll ever having been demanded; that on *Easter Tuesday*, 1835, the defendant in error, *Maund*, and one *Hobbs*, were proposed as churchwardens at a vestry held for the purpose of electing churchwardens, and that *Hill*, one of the plaintiffs in error, and *Goodhind*, were also proposed; that a shew of hands was taken, which was declared to be in favour of *Maund* and *Hobbs*, whereupon a poll was demanded to be taken, according to the statute 58 *Geo. 3*, c. 69. This mode of taking the poll was objected to by an inhabitant present, who insisted that only a single vote should be allowed to every voter, and not the plurality of votes given by 58 *Geo. 3*, c. 69, according to each voter's property. Previous to the election, the following notice, signed by Mr. *Campbell* and the churchwardens, had been circulated in the parish:—

1. The right to demand a poll is by law incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it.

2. A demand of a poll, not made until after the show of hands is declared to be in favour of one candidate, is good.


3. If a demand of a poll to be taken in a particular way is made, and no objection is made to the taking of the poll at all, on the ground that the form of demand is irregular, and a poll is taken, it is a waiver of any irregularity in the form of the demand.

4. In the parish of *P.*, both before and after the passing of the 58 *G. 3*, c. 69, the mode of electing churchwardens had been by show of hands, no poll ever having been demanded; but it did not appear that there was any special custom to exclude a poll:—*Held*, that this parish was not exempted by the

"*Paddington, Middlesex*, 16th April, 1835.

"If a poll should be demanded for the election of churchwardens on *Tuesday* next, it will be open at the National School Room, *Harrow Road*, immediately after the meeting of the inhabitants and occupiers, and will continue

8th section from the operation of that act giving a plurality of votes according to property.
5. A subsequent local act having enacted that the election of churchwardens should be conducted in such manner as hath been usual in the same parish:—*Held*, that a poll still must be taken by a plurality of votes, according to the 58 *G. 3*, c. 69, the mere fact of the votes never having been so taken being immaterial.

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open, for the convenience of the rate-payers, until six o'clock on *Thursday* evening, and likewise from eight to six on the following day; and in this case the ballot for vestrymen will commence on *Thursday* morning next at nine o'clock, will continue until six in the evening, and likewise from eight to six on *Friday*, the following day. If no poll should be demanded for the election of churchwardens, the ballot for vestrymen will commence immediately after the meeting of the inhabitants and occupiers on *Thursday*, will continue until six o'clock that evening, and likewise from eight to six on *Wednesday*, the following day."

On the poll being demanded, the chairman adjourned immediately to the said school room. The poll was then taken, and all rate-payers who had paid their rates were allowed to vote, whether they had been present or not at the vestry meeting when the shew of hands was taken. The poll was kept open two days, and at the close of it *Hill* and *Goodhind* were declared to be duly elected, not only by a majority of votes with reference to property, but also by a majority of single votes. While the poll was open, several rate-payers and inhabitants protested against the mode in which the poll was taken, and accordingly refused to give their votes. All the four candidates were afterwards sworn in by the surrogates. At a vestry meeting held afterwards, *Maund* attended as churchwarden, when he was turned out of the vestry room by the plaintiffs in error, and it was for this assault that the action was brought. It was objected on the part of the plaintiffs in error, that on this evidence *Maund* should be nonsuited, as he had not been properly elected churchwarden. Lord *Denman*, however, directed the jury, that upon the evidence (if believed) *Maund* was duly elected churchwarden; that the 10th section of the local act, 5 *Geo.* 4, c. cxxvi, took the parish of *Paddington* out of the operation of the statute 58 *Geo.* 3, c. 69, as to the election of churchwardens by a plurality of votes in a single person by reason of rateable property in the parish; and that a poll being demanded according to the provisions of that statute, under the circumstances proved, the chairman was not justified in holding it at all; and therefore the election must be determined by the shew of hands, the majority of single votes upon the shew of hands being allowed to be in favour of *Maund*. He then left the case to the jury, who found a verdict for *Maund*. A bill of exceptions, stating the above evidence and direction, having been tendered, excepting to this direction to the jury, a writ of error was now brought accordingly.

Sir *F. Pollock*, for the plaintiffs in error.—Two points are made in this case; first, it is contended that the election of *Maund* by the shew of hands was not valid, there having been a demand of a poll, which demand, in the particular form in which it was made, did not render it a void demand, and that the poll itself was properly taken; and secondly, it is contended that the provisions of the 58 *Geo.* 3, c. 69, apply to the parish of *Paddington*, and that the poll must there be taken according to that statute, and that this is still to be done even since the passing of the local act 5 *Geo.* 4, c. cxxvi. s. 10, and that therefore *Hill* and *Goodhind* were properly elected churchwardens. On the first point, the case of *Anthony v. Seger* (a) shews that a demand of a poll is necessarily incident to a shew of hands, that being

(a) 1 Hagg. Consist. Rep. 9.

merely an expeditious but imperfect method of ascertaining the opinion of the electors. There having been in this case a demand of a poll, the decision by show of hands became nugatory. The demand, notwithstanding the particular form in which it was made, namely, that it should be taken according to the statute 58 Geo. 3, c. 69, is moreover a good demand of a poll, even supposing that that act does not apply to the parish, as it was not necessary that the poll should afterwards be so taken, and as it moreover appears that in fact it was taken both ways, and with a similar result. The case of *The King v. The Archdeacon of Chester* (a) is an authority to shew, that the poll, when taken, need not be confined to those persons only who had been present at the vestry. On the second point, it will be contended on the other side, that the parish of *Paddington* is within the 8th section of the 58 Geo. 3, c. 69, which enacts that that act is not to take away the powers of any vestry of a parish under any special usage or custom. It is however submitted, that there was no special usage or custom in this parish to bring it within that section. It will also be contended, that by the 10th section of the subsequent local act, 5 Geo. 4, c. cxxvi, enacting that the election of churchwardens in *Paddington* shall "be conducted from year to year in such manner as hath been usual in the same parish," this parish is excepted from the effects of the general act. Here the usage referred to could only be intended such usage as by law ought to be followed in conducting the election of churchwardens. That legal usage was, to take a poll according to the plurality of votes, under the 58 Geo. 3, c. 69, and it is immaterial that no actual poll had ever been so demanded and taken subsequent to the passing of that act.

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The Attorney-General, contra.—The whole of this case depends on the point of whether the election of churchwardens is to be by single votes, or by a plurality of votes, under the 58 Geo. 3, c. 69. In the first place, there being no doubt but that *Maund* and *Hobbs* had a majority of votes on the show of hands at the vestry, there was no ground for taking a poll at all. It cannot be said that on every occasion a poll may be demanded at a vestry meeting, thereby giving an opportunity to persons not present to vote. All that was decided in *The King v. Archdeacon of Chester* was, that the chairman could alone, without the consent of the meeting, adjourn it under the particular circumstances of that case. In that case also it is to be supposed that there was a right to demand a poll, which is not the case here. The judgment of Lord *Stowell*, in the case of *Anthony v. Seger*, only applies to cases where there is any doubt as to what is the decision of the vestry on the show of hands. *Prideaux's Office of Churchwardens* (b), also may be cited, as shewing that the persons who attend a vestry are as it were a deputation from the whole parish, and that they alone have power to act in vestry matters. Next, assuming that at common law there was a right to demand a poll, still it appears that in *Paddington* there was a custom to decide the election of churchwardens by show of hands, and the notice previously circulated in the parish cannot have the effect of altering that custom, and of making the taking of the poll valid.—[Lord *Abinger*, C. B.—Such a custom would not be a valid custom, as it appears to me.]—The case of *The King v. St. James's, Westminster* (c) shews, that even if invalid, still under the 10th

(a) 1 Adol. & El. 342; 3 Nev. & Man. 413. (b) Page 40, 4th ed. (c) 4 Ants. 253.

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section of this local act it would now be right to observe such a mode of election. Another ground on which this poll was invalid was, that it was demanded that the votes should be taken under the 58 Geo. 3, c. 69; if, therefore, as the defendant in error contends, the single votes only could be taken, the poll was invalid in consequence of this informal demand. The next point is, that this parish is within the 8th section of the 58 Geo. 3, c. 69, there being clearly an ancient or special usage or custom to conduct the election of churchwardens by show of hands. Even if the parish is not within that section, the 10th section of the local act equally excepts this parish from the effects of the general act, the usual manner of conducting the elections of churchwardens previous to the passing of the local act having been by show of hands. The cases of *Rex v. Birch* (a), and *The Duke of Bedford v. Emmett* (b), both shew, that by the term *usual* manner, is meant the way in which elections were *in fact* conducted, and not the way in which they might have been, had certain legal rights which might have been enforced been resorted to. There is no doubt that both before and after the passing of the 58 Geo. 3, c. 69, the usual manner of conducting these elections was *in fact* by show of hands, and not by taking a poll in any way. The local act also expressly refers to the 58 Geo. 3, c. 69, by directing that its provisions should be observed in the election of vestrymen; it was therefore not intended that those provisions should be observed in the election of the churchwardens.

Sir F. Pollock, in reply.—The principal question in this case is, whether the provisions of the 58 Geo. 3, c. 69, apply to the parish of *Paddington*, for it is impossible to say that a poll can at common law be refused. The case of *The King v. The Archdeacon of Chester* is directly in favour of the plaintiffs in error. The point turns on what was the mode of ascertaining the majority, in elections of churchwardens in the parish of *Paddington*. All that appears is, that no poll was ever demanded; but it does not thence follow that there was no right to demand one, or that there was a custom to exclude such a right; and in the absence of proof of such a custom, it must be taken that a poll might have been at any time demanded. The 10th section of the local act intended merely that the election should still continue in the parishioners at large, and that they should still have the right to elect *both* the churchwardens, as, by the common law, the minister would appoint one.

Cur. adv. vult.

TINDAL, C. J. afterwards (November 26th) gave judgment.—The present case is brought before us by writ of error from the *King's Bench*, founded on a bill of exceptions, which was tendered by the plaintiffs in error (the defendants below), to the direction of the Lord Chief Justice of that Court on the trial of the cause. The action was an action of assault, to which the defendants pleaded a justification, stating in substance that a general meeting of a vestry of the parish of *Paddington* was duly assembled in a convenient place, and that the plaintiff, without right or authority so to do, and not being one of the churchwardens nor a vestryman of the parish, unlawfully intruded himself into the vestry-room, and refused, upon request made, to

go out of the same, whereupon he was gently removed by the direction of the defendants. The *replication* takes issue on the facts of this justification, and the inquiry at the trial was reduced to this single question, whether *Maund*, the plaintiff below, had been duly elected churchwarden or not. The learned Lord Chief Justice told the jury, "that upon the evidence (if believed) the plaintiff *Maund* was duly elected churchwarden; that the 10th section of the Local Act, 5 *Geo.* 4, c. cxxvi, took the parish of *Paddington* out of the operation of the statute 58 *Geo.* 3, c. 69, as to the election of churchwardens by a plurality of votes in a single person by reason of rateable property in the parish, and that a poll being demanded according to the provisions of that statute, under the circumstances proved, the chairman was not justified in holding it at all, and therefore the election must be determined by the show of hands, the majority of single votes upon the show of hands being allowed to be in favour of the plaintiff." To this direction the defendants below excepted in point of law.

The bill of exceptions raises two points, each of which has been argued before us, viz.:—First, whether the election which took place, at a poll demanded and granted, under the circumstances stated in the bill of exceptions, was a legal and valid election; and secondly, whether the provisions of the statute 58 *Geo.* 3, c. 69, apply to and govern the parish of *Paddington*.

And upon the first question we are all of opinion that the election which took place at the poll, demanded and granted in the manner and under the circumstances stated, was a legal and valid election.

We agree to the proposition contended for on the part of the defendant in error, that whatever was the particular mode of electing the churchwardens for the parish of *Paddington*, at the time of passing the Local Act, the same mode is still preserved, and remains unaltered in the parish, by virtue of the 10th section of that act. For the provision in that section, "that elections of churchwardens shall take place on *Easter Tuesday*, and be conducted from year to year in such manner as hath been usual in the same parish," appears to us to intend the usual and customary mode of election *de facto* observed there, whatever it might be, and without any reference to its origin or conformity with the general law. But we are at the same time of opinion, that the mode of electing churchwardens in the parish of *Paddington*, set out in the bill of exceptions, is not inconsistent with, nor does it by any means exclude the right of the parishioners of *Paddington* to have recourse to a poll in the election of churchwardens for that parish.

All that is stated to have been proved to the jury is, "that the mode of electing of churchwardens in the parish of *Paddington* had been by a show of hands, no poll ever having been demanded." There was no evidence before them of any poll having been ever demanded and refused, or of any custom or usage, in negative words, to exclude the granting of a poll when properly demanded.

The question therefore becomes this, whether the right to demand a poll is by law incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it. And we think such right is in point of law a necessary incident or consequence to the mode of election by show of hands, wherever it is not by special custom excluded. Independently of any authority upon the subject, the recourse to a poll, when

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the population of the parish is large, appears to be the only mode of ascertaining with precision the numbers of those who vote on each side, and the right of each elector to vote. Again, it is, under the same circumstances, the only mode by which each individual elector can have the power of expressing his opinion at all, for in the case of populous parishes no vestry room can be large enough to contain the whole body. Still farther, where the election is carried on with any warmth of popular feeling, it is the only mode by which a large portion of the community can express their opinion with freedom and security. But in addition to these general grounds, we think the authority of Lord *Stowell's* judgment, in the case referred to in the course of the argument, is entitled to the greatest consideration in a matter of this nature (*a*), that "where a poll is demanded, the election commences with it as being the regular mode of popular elections, the show of hands being only a rude and imperfect declaration of the sentiments of the electors." "It often happens," adds that learned judge, "that on a show of hands the person has the majority who on a poll is lost in a minority, and if the parties could afterwards recur to a show of hands, there would be no certainty or regularity in elections. I am of opinion therefore," he adds, "that when a poll is demanded, it is an abandonment of what was done before, and that every thing anterior is not of the substance of the election nor to be so received."

The right to demand a poll, being therefore, as it appears to us, by the common law, an incident to the popular election of a person to an office, we think the electors cannot be deprived of it without a special custom of election inconsistent with such right, or expressly excluding it by negative terms, viz. that no such right exists in the particular parish. And we are clear that there is no such finding as to the parish of *Paddington*, or facts stated which could warrant such a finding, but that the case strongly resembles that of *Doe v. Llewellyn* (*a*), where it was held by the Court of *Exchequer*, that the finding in a special verdict, "that there did not appear on the Court rolls any entry of a surrender to the use of a will," was no finding of a custom that lands within the manor could not be surrendered to the use of a will.

But it is objected, that the demand of the poll was in the present case a nullity on two grounds; first, because it was not made until after the show of hands was declared by the chairman to be in favour of the plaintiff and of the candidate joined with him; and secondly, because the demand required that the poll should be taken pursuant to the statute 58 *Geo. 3*, c. 69.

We think it an answer to the first objection, that in the nature of the thing the demand of a poll never is, nor can reasonably be expected to be, made until the necessity for such demand arises, that is, until one of the contending parties is dissatisfied with the decision of the chairman upon the show of hands, from which it is in the nature of an appeal.

And as to the second objection, it might be sufficient to observe there is no evidence in this bill of exceptions that any one of the parishioners in vestry objected to the demand of the poll on that ground. If the granting of the poll had been objected to on that ground and refused, the question might, by possibility, have arisen, whether the annexing to the demand of a poll the requisition of a peculiar mode of conducting it, did or did not afford a justi-

(a) *Anthony v. Seger*, 1 Hagg. Cons. Rep. 13.

(a) 2 *Crom. M. & Ros.* 503.

fiable excuse for the refusal to allow the poll. But in this case neither of the parties objected that a poll should in fact be taken. And as in point of fact, upon the present occasion, a poll was granted and actually taken between the contending parties, we hold there has been a complete waiver of any irregularity, in point of form, in the mode of demanding a poll, even if any such irregularity had existed, which however we think was not the case.

But it is, lastly, and indeed principally objected, that the poll was improperly taken, the electors having been allowed to have a plurality of votes according to the amount of their property, as provided by the statute 58 Geo. 3, c. 69, and not having been each restrained to the exercise of a single vote; whereas the parish of *Paddington*, as it is contended on the part of the plaintiff below, is excepted out of the operation of that act by the 10th section of the Local Act, 5 Geo. 4, so that no elector can have more than a single vote in the election of a churchwarden. But as the evidence before the jury was, that the defendant *Hill* and the candidate joined with him, who were declared duly elected at the poll, were not only elected by a majority of votes with reference to property, but also by the plurality of single votes, it becomes a matter of indifference to the parties to this suit whether the legal right of voting in the parish of *Paddington*, is governed by the statute 58 Geo. 3 or not, for upon neither supposition has the plaintiff below been elected to the office of churchwarden.

As, however, both the parties have been heard on this question before us, and have expressed a desire that we should deliver our opinion upon it, and as we ourselves think the expression of our unanimous opinion may have the effect of preventing any future litigation on the subject, we have thought it right to enter upon the discussion of the second question, that is, whether the mode of election by the statute of 58 Geo. 3, does or does not extend to the parish of *Paddington*.

This question depends for its answer on the proper construction to be put upon the 8th section of the general act, and the 10th section of the local act.

The 8th section of the general act provides, "that nothing in that act contained shall extend to take away, lessen, prejudice, or affect the powers of any vestry or meeting holden in any parish, township, or place, by virtue of any special act or acts, or of any ancient or special usage or custom."

Now there is no special usage or custom as to the mode of electing churchwardens in the parish of *Paddington*, found upon the bill of exceptions, where they are to be elected in vestry. The churchwardens, at the time of passing that act, were chosen by a show of hands, so were the elective churchwardens, generally speaking, throughout most of the parishes in *England*. It is the general mode of election of churchwardens throughout the realm. But it is found that no poll had ever been demanded in the parish; the same may be said of very many, perhaps by far the greatest part of the parishes in *England*, in which the parishioners have never demanded a poll, because they have been satisfied by the show of hands. If the custom within the parish of *Paddington* had by negative words excluded a poll, it would then indeed have been a special usage or custom which would have taken that parish out of the operation of the statute, for it is obvious that an election by show of hands alone, is necessarily inconsistent with the allowance of a plurality of votes in any one person. But if the usage or custom within *Paddington*, as set out in the bill of exceptions, should be held sufficient to exclude a parish

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from the operation of the 58 *Geo. 3*, on the ground of its being special, the statute would have comprehended a very small proportion indeed of the numerous parishes in England.

If then the 58 *Geo. 3*, taken by itself, includes within its operation the parish of *Paddington*, is there any clause in the local act which can exempt the parish from its operation? The only clause which can be contended to have that construction is the 10th. By that clause, as before observed, it is enacted, "that the election of churchwardens shall take place on *Easter Tuesday*, and be conducted from year to year in such manner as hath been usual in the same parish."

This clause, as we have before observed, was intended to leave the parish of *Paddington* precisely in the same condition as it was at the time of the passing that act. Now what was the condition of the parish as to its mode of electing churchwardens at that time? We answer, by show of hands, if no poll is demanded, and if demanded, then by a poll taken according to law. Now by law, at that time, a poll must be taken by a plurality of votes, as provided by 58 *Geo. 3*, where the parish falls within the operation of that statute. And the mere fact that the votes have never been actually taken in that mode since the passing of that statute, is no more a proof that the statute does not apply, than the fact of the non-demand of a poll proves that such poll was not demandable of right.

Upon the whole of this second question, we think that the mode of electing churchwardens in the parish of *Paddington*, before the passing the 58 *Geo. 3*, was by a show of hands, with a power of going to a poll, in which case the majority of single votes decided the election; that the statute 58 *Geo. 3*, gave each voter a plurality of votes at the poll when demanded and held according to the quantity of his estate, and that such being the rightful mode of election at the time of passing the local act, it was continued and preserved to the parish by the 10th section.

We think, therefore, that upon the present record a judgment of *venire de novo* must be awarded.

*Venire de novo* awarded.

Before TINDAL, C. J., Lord ABINGER, C. B., GASELEE, J., VAUGHAN, J.,  
BOLLAND, B., and ALDERSON, B.

### HITCHCOCK v. COKER.

November 26th.

1. An agreement was made by a person on entering into the service of a chemist as his assistant, not to carry on the trade of a chemist in the same town as his master did, nor within three miles of it. The operation of the agreement was not limited to the life of the master, nor to the time that he should carry on his business, nor to any term of years, and therefore extended to the life of the assistant:—*Held*, that the agreement was not on that account illegal as being in restraint of trade.

2. There must be a good and valuable consideration for such an agreement, but the Court will not examine whether the consideration is equal in value to what is given up.

THIS was an action of *assumpsit* brought by the plaintiff in error against the defendant in error, in the Court of *King's Bench*, and tried at the *Somersetshire* Spring Assizes, 1835. The declaration stated, "that whereas, before and at the time of the making of the agreement, and the promise and undertaking of the defendant hereinafter mentioned, the plaintiff was a chemist and druggist, and had taken the defendant into his service as an assistant in his said trade and business, at a certain annual salary in that behalf,

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to be paid by the plaintiff to the defendant, upon condition, amongst other things, that the defendant should enter into, and observe, and perform the agreement hereinafter contained. Now, therefore, the defendant in consideration of the premises and in performance of the said condition, heretofore, to wit, on the 20th day of *April*, in the year of our Lord 1832, by a certain agreement then made by and between the defendant of the one part, and the plaintiff of the other part, after reciting that the plaintiff had taken the defendant into his service as an assistant, at a certain annual salary, upon condition, among other things, that the defendant should enter into, and observe and perform the agreement thereinafter contained, the defendant did in and by the said agreement promise and agree to and with the plaintiff, that if the defendant should at any time thereafter directly or indirectly, either in his own name, or in the name or names of any other person or persons, use, exercise, carry on, or follow the trades or businesses of a chemist and druggist, or either of them, within the town of *Taunton*, in the county of *Somerset*, or within three miles thereof, then, that the defendant, his executors or administrators, should and would on demand pay or cause to be paid unto the plaintiff, his executors, administrators, or assigns, the full sum of 500*l.* of lawful money current in *England*, as and for liquidated damages." Breach, that the defendant did, in his own name, carry on the trade of a chemist and druggist in the town of *Taunton*. To this declaration the general issue was pleaded, on which issue was joined, and a verdict was found for the plaintiff. Afterwards a motion was made in the *King's Bench* in arrest of judgment, on the ground principally that the agreement was illegal as being in restraint of trade. That Court arrested the judgment, on which occasion they gave the following judgment :—

Lord DENMAN, C. J.—This was a motion in arrest of judgment ; the action was in *assumpsit* on an agreement made by the defendant not to carry on the business of a druggist, in the town of *Taunton*. Some minor objections were taken to the declaration, which it is unnecessary to notice, as we are of opinion that the agreement itself is illegal. The law upon this subject has been settled by a series of decisions from *Mitchell v. Reynolds* (a) to *Horner v. Graves* (b), viz. that an agreement for a partial and reasonable restraint of trade upon an adequate consideration is binding, but that an agreement for general restraint is illegal. What shall be considered as a reasonable restraint was much discussed in the case of *Horner v. Graves*, where the Chief Justice of the Common Pleas observed, " we do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive ; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interest of the public is void, on the grounds of public policy." It may indeed be said, that all such agreements in some degree interfere with the public interest, and great difficulty may attend the application of that test, from the variety of opinions that may exist on the quantum of interference with the public interest which the law ought to pre-

(a) 1 P. Wms. 181 ; 10 Mod. 27, 85, 130 ; Fort. 296.

(b) 7 Bing. 735.

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vent; but on the other hand, it appears quite safe to hold that the law will not enforce any agreement for curtailing the rights both of the public and the contracting party, without its being necessary for the protection of him in whose favour it is made. In that case, the question arose upon the distance to which the restraint extended, here it arises upon the time. The agreement as to time is indefinite, it is not limited to such time as the plaintiff should carry on business in *Taunton*, nor to any given number of years, nor even to the life of the plaintiff; but it attaches to the defendant so long as he lives, although the plaintiff may have left *Taunton*, or parted with his business, or be dead. None of the cases in the books turn upon this question, it is indeed alluded to in *Chesman v. Nainby* (a), and the counsel for the plaintiff, *arguendo*, seems to admit that the bond on which that action was brought could not be put in force for a breach after the death of the obligee, but the breach was assigned on another part of the condition and held good. In the present case, the agreement not being under seal and not being divisible, if bad in part is bad altogether. In the absence of any authority establishing the validity of an agreement, though indefinite in point of time, and trying the reasonableness of it by the test above alluded to, we think that the restraint here is larger than the necessary protection of the party (in favour of whom it is given) requires, and that it is therefore oppressive and unreasonable. The consideration for this agreement appears to have been trifling; but even if it had been much more valuable, the same result would have followed. The judgment must be arrested.

A writ of error was then brought in this Court, and the error assigned was the arresting the judgment.

Sir W. W. Follett (with whom was Crowder) for the plaintiff in error.—The judgment given by the Court of *King's Bench* for arresting this judgment, was erroneous. The question in the present case is, whether this restraint, which prevents the defendant from exercising at any time during his life the trade of a chemist in the town of *Taunton*, is an illegal restraint in point of its duration, as being in restraint of trade, and whether there is a sufficient consideration for it. As it was a voluntary act on the part of the plaintiff to take the defendant into his service, he was entitled to make conditions, so that his own business should not be injured by the information the defendant would derive. There appears then to have been ample consideration, and therefore the only point is, whether the agreement not to carry on the business is longer in regard to time than the law will allow. It is submitted that it is not. The Court of *King's Bench* in their judgment say, that this restraint is larger than is necessary for the protection of the party, not being confined to the time that the plaintiff carries on business, nor to the life of the plaintiff; but it is not in fact larger than many restraints extending over a large extent of country, which have been held valid. In the case of the *Dyer* (b), 2 H. 5. f. 5. b. pl. 26, it appears that there was no consideration whatever for the restraint, and it was therefore held illegal. In *Horner v. Graves* (c), a restraint was held void which extended to the distance of one hundred miles round *York*; but that distance would have comprehended a very large proportion of the whole of *England*, and it was in that particular

(a) 2 Str. 739; 2 Lord Raymond, 1456; (b) Called the Weaver's Case, 1 P.Wms. 193.  
 1 Brown, P. C. 234; Fort. 297. (c) 7 Bing. 735.

case held to be unreasonable, being more than sufficient for the necessary protection of the interests of the party. In *Bunn v. Guy* (a), a restraint not to practise as an attorney within 150 miles of *London*, was held good. In that case the restriction was as large in point of time as the present. There are also other reported cases which shew that there is nothing illegal or against public policy, because a restriction will prevent a person carrying on a trade in several different towns. There are three cases in which the plaintiff may require the full protection of a restraint of this kind: on entering into a partnership, on taking an apprentice, and on the sale of the good-will of his business. The plaintiff has a clear right to sell the good-will of his business, and having made this condition with the defendant, he can obtain the sum which it is really worth in his own hands; and yet, according to the judgment of the Court of *King's Bench*, that condition is bad, because it is not confined to the time that the plaintiff carries on the business. The Court of *King's Bench* also says, the restraint should be confined to the life of the plaintiff; but has he not a right to leave his business to his children in the same way in which he carried it on himself? Why should he not be allowed to prevent his assistant setting up as a rival to his children as well as to himself? The good-will of a business is assets in an executor's hands (b). In the same way, suppose the plaintiff took in a partner, and afterwards died or dissolved partnership, is this restraint bad because it will still prevent the defendant setting up business in opposition to the partner? In point of authority also, as well as in point of principle, there is no case to shew that this restriction ought to have been more confined in point of time. The leading case is that of *Mitchel v. Reynolds* (c). In that case the Court said, "We are all of opinion, that a special consideration being set forth in the condition, which shews that it was reasonable for the parties to enter into it, the same is good." Again, "Wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained" (d). Again, "In that case (e) all the reasons are clearly stated, and indeed all the books, when carefully examined, seem to concur in the distinction of restraints general and restraints particular, and with or without consideration, which stands upon very good foundation; *volenti non fit injuria*; a man may upon a valuable consideration, by his own consent, and for his own profit, give over his trade, and part with it to another in a particular place" (f). This must mean that he may part with it for ever if he likes. The whole of that judgment is in favour of the plaintiff in this case.—[Lord Abinger, C. B.—Did that case turn entirely on the point of want of consideration for the restraint?—Yes, it did. There the restraint was confined to twenty-five years; but if it was good for that time, it would be equally good for one hundred, or any number of years, as no line can be drawn in that respect. If the objection made in the present case is to prevail, all the reported cases where the restraints were not confined in point of time, were open to the same objection. In *Chesman v. Nainby* (g), to which reference is made in the judgment of the Court of *King's Bench*, the restraint extended to the life of

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(a) 4 East, 190.

(b) *Worrall v. Hand*, Peake, 74.

(c) 1 P. Wms. 181; 10 Mod. 27, 85, 130; Fort. 296.

(d) 1 P. Wms. 182.

(e) Noy, 98; W. Jones, 13; Cro. Jac. 596; 2 Rol. Rep. 201.

(f) 1 P. Wms. 186.

(g) 2 Str. 739; 2 L. Raym. 1456; 1 Brown, P. C. 234; Fort. 297.

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the defendant, yet the bond was held good. In *Davis v. Mason* (a), a restraint limited to fourteen years was held good; and that case is an authority for the plaintiff, as by the judgment of the Court of *King's Bench* it ought also to have been limited to the life of the party. In *Bunn v. Guy* (b), the restraint was not limited as to time, yet the contract was held good. That case was referred to by the Court of *Chancery*, in the judgment given in the case of *Bozon v. Farlow* (c). In the case of *Hayward v. Young* (d), a bond conditioned not to set up a business, was held good; yet there the condition extended to the whole life of the obligor. *Homer v. Ashford* (e), is also an authority in favour of the plaintiff. A manufacturer who has secrets in his trade, must surely be allowed to protect himself during the life of any person whom he takes into his manufactory as an assistant.—[Lord Abinger, C. B.—I think this case turns, not on the question whether the plaintiff had a good reason to make this restraint, but whether it is a restraint against public policy.—Alderson, B.—In *Bunn v. Guy*, the restraint was for life, yet it was there held that the agreement was good.]—The case on which the decision of the Court of *King's Bench* proceeded was that of *Horner v. Graves* (f); but it is submitted on an erroneous application of that case. The two cases differ essentially. The large extent of country comprehended within the distance of one hundred miles round *York*, when considered with reference to the nature of the particular occupation, was in that case decided to be an unreasonable restraint of trade, as being more than a fair protection to the interests of the party, and so large as to interfere with the interests of the public. In this case the restraint as to time is not larger than the interests of the plaintiff require, nor does it interfere with the interest of the public. Applying therefore the test mentioned by the Court in *Horner v. Graves*, to the present case, this agreement is valid. In the cases of *Bryson v. Whitehead* (g), *Williams v. Williams* (h), and *Capes v. Hutton* (i), the same principles have been recognised.

*Erle*, (with whom was *Montague Smith*), *contra*.—This contract is void, on the general principle that all agreements in restraint of trade are void, except particular restraints on a good and adequate consideration; *Mitchel v. Reynolds*. The Court has to consider, first, whether this restraint is wider than is necessary for the protection of the plaintiff; and secondly, whether it was made on a good and adequate consideration. In point of time it was wider than was necessary, as it extends to the whole life of the defendant, whether or not the plaintiff continues to carry on his business. It is for the plaintiff to shew clearly to the Court, which he has not done, that this was necessary for his interests, so as to bring himself within the exception to the general principle. Next, the consideration, it is submitted, is certainly not a good and adequate consideration so as to make this restraint valid. Nothing is recited in the agreement as to be performed by the plaintiff; the defendant was already in his service, and it appears almost to be a *nudum pactum*.—[Lord Abinger, C. B.—The plaintiff took the defendant into his service in consideration of his signing this agreement.—Alderson, B.—How is the Court to decide on this record whether the consideration was adequate or not?]

(a) 5 T. R. 118.  
(b) 4 East, 190.  
(c) 1 Meriv. 459.

(d) 2 Chit. R. 407.  
(e) 3 Bing. 322.  
(f) 7 Bing. 735.

(g) 1 Sim. & Stu. 74.  
(h) 2 Swanst. 253.  
(i) 2 Russ. 357.

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There are several cases in which the Court has decided that question. In the case of *Mitchel v. Reynolds*, the adequacy of the consideration was considered by the Court, as will appear on reference to the judgment. In an *Anonymous* case (a), a bond not to exercise a trade within a particular town was held void.—[Lord Abinger, C. B.—In that case the master got the bond from his apprentice *after* he was bound to him.—*Alderson*, B.—There was no consideration whatever.]—In the *Blacksmith's* case (b), a similar bond was held void. In *Prugnell v. Gosse* (c), it was said by the Court, that where there was no consideration for the restraint, an agreement to enforce it was void; but the Court in that case, on looking at the interests of the parties, decided that agreement to be valid. In the late case of *Young v. Timmins* (d), Lord Lyndhurst says that an agreement in restraint of trade must be supported by an *adequate* consideration.—[*Tindal*, C. J.—Was not that rather a case where there was no consideration whatever?—*Alderson*, B.—The consideration was to employ the defendant as theretofore, which was *if the plaintiff liked*.]—Here also there was no time stipulated during which the plaintiff was to employ the defendant; it was therefore determinable whenever the plaintiff chose.—[Lord Abinger, C. B.—There was an annual salary; the agreement, therefore, was for a year at least.]—For any thing that appears, the engagement may have been put an end to by the plaintiff immediately after the agreement was signed, or even perhaps before, which makes the case stronger than that of *Young v. Timmins*. In *Gale v. Reed* (e), a covenant to employ two persons exclusively in making cordage, was only held not to be illegal as in restraint of trade, because, when the whole indenture was construed together, it shewed that the consideration was *adequate*, being co-extensive with the restraint imposed.—[*Alderson*, B.—Would Lord *Ellenborough's* decision in that case have been different had there been only one farthing per cwt. allowed on the cordage, for that is the question which arises in the present case?—He says that the restraint on one side should be co-extensive with benefits to be enjoyed on the other. The judgment of the Court in the case of *Chesman v. Nainby* is also in favour of the defendant. The Court of *Common Pleas*, in the case of *Horner v. Graves*, seems to have followed the principle, that it is necessary to shew that every restraint is necessary, and was made on an *adequate* consideration. The Court says (f), “As to the consideration, it must be confessed it is *very small*, compared with the restraint under which the defendant consents to place himself;” and then, after stating the circumstances of the case, they say, “Surely this appears a *very slender and inadequate* consideration for such a sacrifice.”—[*Tindal*, C. J.—The ground on which that judgment was given is contained in the concluding words, that the restraint is “far larger than is necessary for the protection of the plaintiff in the enjoyment of his trade.”]—The value of the consideration also must surely have been one ground. If, in that case, where the agreement was made for five years, and at a salary of 120*l.* and upwards, it was held invalid, it must equally be held invalid in this case, where no time is agreed upon, no salary is fixed, and nothing appears except that the parties were placed in the situation of master and servant. The restraint was also far larger than was required to protect the interests of the plaintiff, and the judgment of the Court of *King's Bench* must be affirmed.

(a) *Moore*, 115, pl. 268.(b) 2 *Leon*. 210; 3 *Leon*. 217; *Moore*, 242.(c) *Aleyn*. 67.(d) 1 *Cr. & Jerv*. 331.(e) 8 *East*, 80.(f) 7 *Bing*. 742.

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Sir *W. W. Follett*, in reply.—There is no case in which the Courts have decided on the *adequacy* of the consideration in the sense now contended for, though there are several where the Courts have decided whether there was *any* consideration whatever. It is true the term “adequate” is used by Lord *Lyndhurst* and *Bayley*, B. in the case of *Young v. Timmins*; but *Tindal*, C. J., in the case of *Horner v. Graves*, does not make use of the term. The terms “adequate,” “good,” and “sufficient,” are used as convertible terms. It is moreover impossible for the Court to examine into the adequacy of the consideration in point of value in the sense now contended for. There is no doubt but that this agreement was part of the original contract between the parties.—[*Alderson*, B.—It was nothing more than a written agreement to do that which was originally contracted for.]—Exactly. The question is, whether the agreement was oppressive or illegal. The case of *Ridgway v. The Hungerford Market Company (a)*, shews that the defendant might have recovered his wages as assistant for a year at least. In *Davis v. Mason*, it was held that a bond taken under circumstances similar to the present was good, although the service was to continue so long only as it should please the plaintiff. In *Bunn v. Guy*, the consideration was certainly different from the present; that was a consideration applicable to that business; but in this case, taking the defendant into the plaintiff’s service at all, it is submitted, is a sufficient consideration. The *Anonymous* case in *Moore*, and the *Blacksmiths’* case, were cases of no consideration whatever. The case of *Young v. Timmins* is another of the same class. The judgment of *Hullock*, B. in the case of *Wickens v. Evans (b)*, may also be referred to, as in favour of the plaintiff.—[*Alderson*, B.—In *Bunn v. Guy*, the counsel for the plaintiff first rested his argument on the point of it being a *nudum pactum*, when Lord *Ellenborough* intimated that he could not succeed on that ground.]—But there is nothing in that case to shew that the *amount* of the consideration was that on which the Court founded their judgment. There is then in this case, on the face of the agreement, a good consideration for the restraint imposed; that restraint is not larger than is required for the protection of the plaintiff; and the public cannot be injured by the defendant being prevented setting up business in *Taunton*: the agreement therefore is valid, and the judgment must be reversed.

Cur. adv. vult.

TINDAL, C. J. afterwards (*February 26th*) gave judgment.—The ground upon which the Court of *King’s Bench* held, after a verdict obtained by the plaintiff in this case, that the judgment of that Court ought to be arrested, was, that the agreement set out upon the record, and upon which the action was brought, was void in law, being an agreement in unreasonable restraint of trade. For although the inadequacy of the consideration upon which the agreement was entered into was urged in argument, as one reason for holding the agreement to be void, and in the delivering the opinion of the Court some reference was made to that objection, yet it is manifest that it formed no part of the ground upon which the Court refused to give their judgment in favour of the plaintiff. The consideration for the agreement in question appears to have been the receiving of the defendant into the service of the plaintiff as an assistant in his trade or business of a chemist and druggist, at

(a) 1 Har. & Wol. 244; 3 Adol. & El. 171.

(b) 3 Younge & Jerv. 318.

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a certain annual salary; and the agreement on the part of the defendant, founded upon such consideration, is, that if he should at any time thereafter, directly or indirectly, in his own name or that of any other person, exercise the trade or business of a chemist and druggist, within the town of *Taunton*, in the county of *Somerset*, or within three miles thereof, then that the defendant should, on demand, pay to the plaintiff, his executors, administrators, or assigns, the full sum of 500*l.*, as and for liquidated damages.

The ground upon which the Court below has held this restraint of the defendant to be unreasonable, is, that it operates more largely than the benefit or protection of the plaintiff can possibly require; that it is indefinite in point of time, being neither limited to the plaintiff's continuing to carry on his business at *Taunton*, nor even to the term of his life. We agree in the general principle adopted by the Court, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void. But the difficulty we feel is in the application of that principle to the case before us. Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it; such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on; with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But, with respect to *the duration* of the restriction, the case is different. The good-will of a trade is a subject of value and price; it may be sold, bequeathed, or become assets in the hands of the personal representative of a trader; and if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such good-will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue if the master sells the trade or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser or legatee or executor; and the only effectual mode of doing this appears to be by making the restriction of the servant's setting up or entering into the trade or business within the given limits co-extensive with the servant's life. And accordingly, in many of the cases which have been cited, the restriction has been held good, although it continued for the life of the party restrained; and, on the other hand, no case has been referred to where the contrary doctrine has been laid down. In *Bunn v. Guy*, a covenant by an attorney, who had sold his business to two others, that he would not, after a certain day, practise

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within certain limits as an attorney, was held good in law, though the restriction was indefinite as to time. In *Chesman v. Nainby*, the condition of the bond was, that *Elizabeth Vickers* should not, after she left the service of the obligee, set up business in any shop within half a mile of the dwelling-house of the obligee, or of any other house that she, her executors or administrators, should think proper to remove to in order to carry on the trade; and in that case the contract was held to be valid, though the restriction was obviously indefinite in point of time, and although one of the grounds on which the validity of the contract was sought to be impeached was, that the restriction was for the life of the obligor. Again, in *Wickens v. Evans*, the agreement in restraint of trade was made to continue during the lives of the contracting parties, and no objection was taken on that ground.

We cannot therefore hold the agreement in this case to be void, merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction.

But it was urged in the course of the argument, that there is an inadequacy of consideration in this case with respect to the defendant, and that upon that ground the judgment must be arrested. Undoubtedly in most, if not all the decided cases, the judges, in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression, that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If by that expression it is intended only that there must be a good and valuable consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void. But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court in every particular case which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another, and the same may be observed as to other considerations.

It is enough, as it appears to us, that there actually is a consideration for the bargain, and that such consideration is a legal consideration and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary. We therefore think, notwithstanding the objections which have been urged on the part of the defendant, that the plaintiff has shewn upon the record a legal ground of action, and having obtained a verdict in his favour, that he is entitled to judgment.

Judgment for the plaintiff.

A

DIGEST

OF THE

CASES REPORTED IN THIS VOLUME.

CONTAINING

THE DECISIONS OF THE COURT OF KING'S BENCH AND BAIL COURT,

FROM

EASTER TERM, 6 WILL. IV. 1836, TO MICHAELMAS TERM, 7 WILL. IV. 1836, INCLUSIVE.

ACTION.

See STATUTE OF FRAUDS, 1. PLEADING, 23, 25.

ADVERSE POSSESSION.

See MORTGAGE, 1. POOR, 9.

ADVOUSON.—See ECCLESIASTICAL LAW.

AFFIDAVIT.

See PRACTICE, 1. ATTACHMENT, 2, 3, 4. GRAND JURY, 3.

AGENT.—See ASSUMPSIT, 1. EVIDENCE, 2.

AMENDMENT.

1. The declaration in an action for an escape, contained only one count, alleging an escape, against the sheriff. The evidence proved a negligent omission by the sheriff's officer to make the arrest when he had it in his power to do so. The judge was applied to to amend, but refused to do so. He left the question of a negligent omission to the jury, who found generally for the defendant, and that in the affirmative; and the special finding was indorsed on the record:—*Held*, that the plaintiff was entitled to have a judgment entered according to the special finding. *Guest v. Elwes*, 34.

2. In order to entitle a party to have judgment entered for him under the 3 & 4 Will. 4, c. 42, "according to the very right and justice of the case," he must apply to the judge who tries the cause to amend the pleadings before the verdict has been pronounced. After verdict it is too late. *Serjeant v. Chafey*, 273.

3. A verdict having been taken by consent, subject to a reference to arbitration, the arbitrator certified that it would be agreeable to the justice of the case to amend the replication, which traversed a particular allegation, by substituting a replication of *de injuriâ*; the Court refused to make the amendment. *Cross v. Metcalf*, 377.

VOL. II.

APOTHECARY.—See PLEADING, 4, 5.

APPRENTICES.—See POOR, 1, 2, 3, 4, 5, 6.

ARBITRATION.

See AMENDMENT, 3. ATTACHMENT, 2, 3, 4, 5. PRACTICE, 53, 82. STATUTE OF FRAUDS, 1.

1. The statutes 9 & 10 Will. 3, c. 15, and 3 & 4 Will. 4, c. 42, as to references to arbitration, apply to civil proceedings only. Therefore, by the 39th section of the latter act, a party to a reference of a criminal proceeding, is not restrained from revoking the authority of the arbitrator. *The King v. Bardell*, 401.

2. An umpire was appointed by lot, in consequence of an agreement by the arbitrators. This was not known or assented to by the parties, but was known to the attorney of the party applying to set aside the award. When, however, the umpire was so appointed, he was specially objected to by the arbitrator appointed by that party; and that fact was not known to the attorney:—*Held*, that there was not a sufficient assent to the mode of appointment, because the whole facts were not within the knowledge of the party assenting, and consequently that an award made by an umpire so appointed, was bad. *In re Jamieson*, 35.

3. *Quære*, whether the attorney had power to bind his client by such an assent. *Id.*

4. Two arbitrators were empowered to decide, among other matters, on what terms a building lease held by an individual under a corporation should be renewed. The arbitrators awarded that the corporation should put the premises in "good tenantable repair, &c. to the satisfaction of J. M. of S., in the county of K., builder:"—*Held*, that this reference of the repairs to the judgment of a third person was not within the authority of the arbitrators, and made the award bad. *Tomlin v. The Mayor and Corporation of Fordwich*, 172.

5. A cause, in which there were several issues, was referred to arbitration, the costs to abide the event. The arbitrator awarded on each issue separately, and partly for each party, but gave no direction for entering a verdict or a *nolle prosequi*:—*Held*, that the award was sufficiently final, so that the costs could be taxed. *Clarke v. Owen*, 324.

6. He also awarded that the defendant should pay a certain sum, "together with the costs of the suit and reference, so far as they shall have been taxed by the proper officer on the 7th November:"—*Held*, that this was not an award of what costs were to be paid, but only as to the time when. *Id.*

7. A cause in which there were three issues was referred to arbitration at *Nisi Prius*, on the usual terms. The arbitrator found two issues for the plaintiff, and one for the defendant, and said in his award, "that if there had been no issue relative to the consent, (the matter in issue on the one found for the defendant,) I should have awarded 1s. damages to the plaintiff upon the other issues:"—*Held*, that the plaintiff was not entitled to move the Court for judgment *non obstante veredicto* on the issue found for the defendant. *Steeple v. Bonsall*, 11.

8. Such an award is sufficiently final. *Id.*

9. In an action by an attorney, on a bill of costs, a verdict was taken by consent, and the matter was referred, together with all matters in difference. Another bill of costs was also disputed before the arbitrator. He merely awarded that the verdict should be entered for a certain sum, and that the defendant should pay the costs of the reference, without saying that that sum was for the first bill of costs, or making any mention of the second bill:—*Held*, that the award was bad. *Gyde v. Boucher*, 127.

ARREST.

See ASSUMPSIT, 3. COSTS, 5. PRACTICE.

ASSIGNMENT OF PROPERTY.

See PLEADING, 26..

1. If A., in order to pay B. a sum of money, assigns to B. all his interest in a debt due from C., it is not necessary that a strictly formal notice of such assignment should be given to C. *Tibbitts v. George*, 154.

2. An assignment thus made of an equitable interest need not be in writing, nor, if C. assents to the assignment, will the insolvency of A., before the whole transaction is complete, vest the right to the debt assigned in the insolvent's assignees. *Id.*

3. Though the debt assigned may be more than will cover B.'s demand, the existence of a residuary interest in it in A., will not prevent the vesting of the assignment in B., nor make him a trustee for A.'s assignees; their interests are separate and independent. *Id.*

4. An innkeeper being indebted to several persons, made two of his creditors trustees, and conveyed all his estate and effects to them, in trust, "to sell when they should think proper and advantageous:" and upon trust, so long as they should think it desirable and advantageous, to continue and carry on the business, and pay and apply the monies arising

therefrom, 1st, in payment of the charges of the deed; 2dly, in reduction or payment of their own debts; and 3dly, in payment of any expenses necessary for carrying on the business, and the surplus unto and amongst themselves and all other creditors who should execute the deed within three months:—*Held*, that this deed was void, as it contained such an imposition of terms as no creditor was bound to submit to. *Owen v. Body*, 31.

5. *Semble*, that such creditors as did come in and execute would be partners, and subject to the bankrupt laws. *Id.*

6. At the time the deed was executed, the trader had omitted to renew his expired annual wine, beer, and spirit licences, but at the next first opportunity they were renewed by the trustees:—*Held*, that this circumstance formed no objection to the deed, on the ground that it was an assignment to persons to carry on an illegal trade. *Id.*

ASSUMPSIT.

See CARRIER, 1. HUSBAND and WIFE.

1. If a person, who is not a general agent, has money sent to him to pay over to a third person, and acknowledges he has received it for that purpose, the third person may maintain *assumpsit* for money had and received. *Lilly v. Hays*, 338.

2. A person to whom a bill was intrusted, wrongfully paid it into his bankers on his own account, and received credit for the amount, but never drew specifically upon the credit of the bill. An action for money had and received was brought by the owner of the bill before it became due:—*Held*, that it was not maintainable. *Atkins v. Owen*, 59.

3. A party knowingly arrested another for an unfounded claim. The party arrested, in order to obtain his discharge, paid a part of the amount, and entered into an agreement to put in bail for the remainder:—*Held*, that he might recover back the amount paid, in an action of *assumpsit* for money had and received. *Duke de Cadaval v. Collins*, 54.

ATTACHMENT.—See PRACTICE, 44. SHERIFF, 1.

1. An indictment against several persons was removed into this Court by *certiorari*, without the consent of one of the defendants, who afterwards was alone tried on it and found guilty, the other defendants having come to an arrangement with the prosecutor; he was afterwards taken on an attachment for the costs of the prosecution, but the Court, under the circumstances, discharged him. *The King v. Hassel*, 321.

2. An affidavit in support of an attachment for non-performance of the award of T. Wood, by mistake stated a service of the award of T. Ward thereunto annexed:—*Held*, that the mistake was immaterial. *Smith v. Reeves*, 306.

3. Such an affidavit need not state that the time for making the award had been enlarged, the enlargement having been made a rule of Court. *Id.*

4. The award directed that the costs should be borne in equal moieties, and that if either party paid the whole, the other should repay the moiety; the affidavit in support of an attachment for non-payment of the moiety, must state that the party had paid the whole, and it is not sufficient to state that the other party was informed that the whole had been paid. *Id.*

5. The award having directed the delivery up of a particular box, which was a matter not specifically referred to the arbitrators, but which had been parted with before the date of the submission, an attachment cannot be granted for non-performance of that part of the award. *Smith v. Reeres*, 306.

ATTORNEY.

See ARBITRATION, 2, 3, 9. COSTS, 17. INN OF COURT. JUDGMENT, 2. LIEN. PRACTICE, 41.

I. Admission and Re-admission.

1. Rules as to the admission and examination of attorneys, E. T. 6 Will. 4, 1836, 1.

2. The rule which requires notice to be given by an attorney, of his intention to apply for admission, "three days, at the least," before the term, must be construed as if it required "three clear days," and the days must all be exclusive. *Anon.* 65.

3. The Court will, under particular circumstances, dispense with a term's notice in the case of the admission of an attorney. *Ex parte Handcock*, 99.

4. An attorney who wanted to go abroad to practise, allowed to be admitted on the last day of the term previous to that in which he would strictly have been entitled. *Ex parte Lawson*, 85.

5. Where a person, during his clerkship, changed his name, and by mistake forgot to put up both his former and present name in his notice, the Court, on being satisfied that it was solely from mistake that he had omitted to do so, permitted him to give notice at the end of one term for admission in the next. *Ex parte Ridley*, 66.

6. An attorney, who by mistake in not taking out his certificate, was off the roll for two days, was allowed to be re-admitted without giving the usual notice. *Ex parte Minchin*, 326.

7. An attorney, who while off the rolls has practised in a borough court, may be re-admitted without payment of fine or of the arrears of duty. *Ex parte Thomson*, 327.

8. A person who has been off the roll of attorneys for thirty years cannot be re-admitted. *Ex parte Billings*, 327.

II. Summary Jurisdiction of the Court.

9. A person who had been an attorney of the Court of Great Sessions, and who had been admitted an attorney of the Court of King's Bench, under stat. 11 Geo. 4 and 1 Will. 4, c. 70, cannot be called on summarily to answer for misconduct committed when an attorney of the Court of Great Sessions. *In re Williams*, 294.

10. *Semble*, an attorney cannot be called on to answer the matters of an affidavit, shewing malpractice in hiring bail. *Clifford v. Parker*, 297.

11. An attorney who took a bill of exchange from a defendant, in order to settle the plaintiff's bill of costs, and who omitted to do so, but made use of the bill of exchange, cannot be called on to answer the matter on affidavit. *Ex parte Scott*, 296.

12. The Court will not summarily compel an attorney to perform an undertaking given by him to indemnify a nominal defendant in an ejectment. *Ex parte Clifton*, 296.

13. An attorney who acted for one of the parties to

an arbitration, and who gave his undertaking to pay a certain sum for his client in order to save the expense of a formal award, may be called on summarily to perform his undertaking, although no cause was depending in the Court. *Ex parte Fryer*, 294.

III. Other Matters.

14. If an attorney brings an action within a court of limited jurisdiction, knowing that the circumstances which gave the right of action arose without the jurisdiction of such court, he is guilty of negligence. *Williams v. Gibbs*, 241.

15. If a plaintiff colludes with the defendant and settles the action, so as to deprive his attorney of his right to retain the sum recovered for costs due to him, the attorney cannot go on and compel the sheriff to return a writ of *ca. sa.* *Hedges v. Jordan*, 92.

16. A charge for advising a client as to an execution on a judgment obtained against him, is not a taxable item in a bill of costs, so as to require a signed bill to be delivered before bringing an action. *Pepper v. Yeatman*, 116.

ATTORNMENT.

See EJECTMENT, 11, 12. STAMP, 2.

AUCTION.—See EVIDENCE, 12.

BAIL.—See PRACTICE, II.

BAILIFF OF A LIBERTY.—See PRACTICE, 81.

BANKRUPT.

See ASSIGNMENT OF PROPERTY. CORPORATION, 2.

BASTARD.—See SESSIONS, 1, 2, 3, 4, 5.

BILL OF EXCHANGE.—See EVIDENCE, 7, 9.

1. Where a drawer of a bill of exchange is one of the partners of a firm by which it is accepted, the notice which any one of the partners of that firm receives of its dishonour, is notice sufficient to bind the partner who is the drawer. *Hills v. Thorogood*, 102.

2. In such a case it is not necessary to prove that the partnership was in existence at the time the bill became due. *Id.*

3. A. made a promissory note payable to B. or his order. C. indorsed it:—*Held*, that by this indorsement C. did not become a new maker of the note, but was liable only in his character of indorser, and was as such entitled to notice of dishonour. *Gwinnett v. Herbert*, 194.

CAPIAS.—See PRACTICE, 51, 52.

CARRIER.

1. A parcel directed to London was delivered by the plaintiff to a carrier at Bradford; no directions were given him as to the mode of conveyance. He left it at an inn in Melksham, where the defendants' coachman, and many other coaches were in the habit of calling for parcels to be conveyed to London. The innkeeper delivered the parcel to the defendants' coachman, who paid him for the carriage from Bradford to Melksham:—*Held*, that the defendants were liable to the plaintiff, in an action of *assumpsit*, for the loss of the parcel. *Syms v. Chaplin*, 411.

2. An inn where a coach regularly stops to receive and deliver parcels, is a receiving-house within the meaning of the Carriers' Act, 11 Geo. 4 and 1 Will. 4, c. 68, although other coaches stop there for the same purpose, and although the innkeeper keeps but one general booking-book for all the coaches, and uses his own discretion as to the coach by which the parcel is sent. *Syms v. Chaplin*, 411.

CERTIORARI.

See ATTACHMENT, 1. HIGHWAY, 3.

1. The Court will not grant a *certiorari* to remove an indictment for obstructing a highway, unless some particular difficulty is specified as likely to arise on the trial. *The King v. Jowl*, 375.

2. *Certiorari* to remove an indictment found at sessions, on the ground that a magistrate was interested in the matter, granted to a prosecutor. *The King v. Jones*, 293.

3. *Certiorari* to remove an indictment for keeping a gaming-house refused to the prosecutor, where it was suggested that questions would arise on an acquittal on a former indictment, in which the house had been misdescribed. *The King v. Hancock*, 293.

4. A *certiorari* does not lie to remove an indictment from the Central Criminal Court, on the ground that difficult points of law will arise on the trial of the case. *The King v. Templar*, 430.

5. *Certiorari* to remove an indictment from the Central Criminal Court granted, although one of the defendants did not consent to it, he appearing to collude with the prosecutor. *The King v. Connop*, 81.

6. Where an act of parliament authorised justices to make an order, but provided that such order should have no effect until it had been confirmed and inrolled by the sessions:—*Held*, that the six months within which, under 13 Geo. 2, c. 13, a *certiorari* to remove it must be applied for, do not begin to run until the order has been confirmed and inrolled. *The King v. The Justices of Middlesex*, 407.

7. A recognizance entered into by only two of the inhabitants of a parish, on removing by *certiorari* an order of justices in a parish appeal, is not sufficient, according to the provision of 5 Geo. 2, c. 19, s. 2. *The King v. The Inhabitants of Abergele*, 375.

8. A *certiorari* to remove an order of justices, applied for before, but not obtained till after the expiration of six months after the order was made, is in time. *Id.*

9. The recognizance being insufficient, the Court sent the writ down again to be allowed, on a proper recognizance being entered into. *Id.*

10. With respect to proceedings under the General Turnpike Act, 3 G. 4, c. 126, the *certiorari* is not taken away by 4 Geo. 4, c. 95. *The King v. The Trustees of the Norwich and Watton Turnpike Road*, 385.

CHATTEL.—See TROVER.

CHURCHWARDEN.

See OFFICER. INCLOSURE, 1. RATE.

CLERK, PARISH.—See POOR, 7.

COGNOVIT.

The attestation to a cognovit given by a person in custody, must state expressly that the witness subscribes as attorney. *Kirke v. Dark*, 94.

COMPENSATION.—See STATUTE, 1.

A dock act gave a Company power to purchase houses, &c., stop up streets, make cuts, and do other things necessary to carry the object of the act into effect; and it provided, "that if any person having an estate or interest, not less than a tenancy from year to year, in any houses, lands, or hereditaments, should be injured in his, her, or their said estate or interest by the making of any such cut &c., he, she, or they should be compensated." Two parties claimed compensation in respect of the destruction of the business of a public-house by the removal of the neighbourhood and the stopping up of the ways:—*Held*, that this was not such an injury to "estate and interest" as to entitle them to compensation. *The King v. London Dock Company*, 267.

CONTRACT.—See STATUTE OF FRAUDS.

CONVICTION.—See FORCIBLE DETAINER.

COPYHOLD.—See MANDAMUS, 4. MANOR.

Where an admission to a copyhold is made in pursuance of a surrender, or what by statute is equivalent thereto, and not as or in consequence of a voluntary grant by the lord, the lord's title is immaterial. *Doe d. Burgess v. Thompson*, 451.

CORPORATION.

See LIEN. MANDAMUS, 2. QUO WARRANTO.

1. It seems that the 68th section of the 5 & 6 W. 4, c. 76, applies to charges voluntarily created by a corporation: the 71st section, to estates left to the corporation by other persons for charitable purposes. *The King v. Williams*, 275.

2. The statute 5 & 6 Will. 4, c. 76, (the Municipal Corporation Act,) does not disqualify an uncertificated bankrupt from being elected mayor, alderman, or councillor. *The King v. Chitty*, 399.

COSTS.—See ATTACHMENT, 1. ATTORNEY, 16. MANDAMUS, 10, 11.

1. The Court of K. B. cannot grant costs to the prosecutor in a Court below, although those costs have been incurred in consequence of the defendant having sued out and improperly kept, without giving notice of it, a *certiorari*, which has been afterwards quashed. *The King v. Higgins*, 397.

2. Rule to compel a third person to pay defendant's costs of an action, on an affidavit that it was "believed" he had in fact defended the action, refused. *Blewitt v. Tregonnin*, 325.

3. A plaintiff having recovered by verdict a sum of money beyond another sum paid into Court, the two sums together amounting to more than 20l.:—*Held*, that the taxation of costs ought not to be on the reduced scale ordered in H. T. 4 Will. 4. *Masters v. Tickler*, 81.

4. An interest in the water appurtenant to a dwelling-house is an interest in land, and where such an interest comes in question, the Court will allow the plaintiff full costs, notwithstanding a certificate that the damages were for a sum less than 40s. *Tyler v. Bennett*, 272.

5. The defendant was arrested for 20l. 2s. 1d. for goods sold and delivered. Plea, infancy. Replication, that the goods were necessities. Verdict for 10l., the price of the goods proved to have been delivered. The affidavit of the defendant stated that he never owed 20l.; the affidavit of the plaintiff, that goods to the amount of upwards of 20l. had been delivered, and that the judge certified that the cause was a proper one to be tried before him:—*Held*, that the defendant was entitled to his costs under 43 Geo. 3, c. 46. *Ballantyne v. Taylor*, 453.

6. A verdict having been taken by consent for the plaintiff, and the cause and all matters in difference referred, the arbitrator awarded a less sum to the plaintiff than that for which he had arrested the defendant, and then awarded separately on the other matters referred:—*Held*, that the defendant was not precluded from having his costs under 43 Geo. 3, c. 46. *Jones v. Jehu*, 119.

7. If the Court, on the authority of the report of its officers, pronounces, for the first time, a proceeding to be irregular, the party committing the irregularity must pay the costs occasioned by it. *Anon.* 64.

8. If a jury find a verdict for a sum above 40s., which is reduced below that sum by the Court on a point of law reserved, the plaintiff may be deprived of his costs under the Middlesex County Court Act. *Wills v. Langridge*, 309.

9. It is immaterial that the point of law arose on the absence of some formal evidence which might have been supplied. *Id.*

10. A rule cannot be granted to enter a suggestion to deprive the plaintiff of his costs, under sect. 19 of that act, unless the cause of action arose within the county of Middlesex, as well as the defendant resided there. *Id.*

11. Where it appeared that the defendant resided in Middlesex, but it did not appear where the cause of action arose, the Court presumed that it arose in Middlesex, and therefore made such a rule absolute. *Id.*

12. *Semble*, it is no objection to such a rule, that the sheriff, before whom the cause was tried, cannot give the certificate mentioned in sect. 19 of the act. *Id.*

13. A plaintiff having obtained a verdict, a new trial was afterwards granted, the rule being silent as to costs. Notice of trial was given by the plaintiff. Before the time of trial came on, the defendant withdrew his pleas, and judgment went by default:—*Held*, that the plaintiff was not entitled to the costs of the trial. *Peacock v. Harris*, 456.

14. To a special action on an agreement with an account stated, the defendant pleaded, first, *non assumpsit*; secondly, that the agreement was obtained by fraud and covin; and, thirdly, that the agreement was void, being an agreement for an interest in land, and not being under seal. The plaintiff took issue on the two first pleas, and demurred to the last. The cause was tried, and the

plaintiff recovered a verdict with damages on the issue as to fraud and covin, but gave no evidence of an account stated, and the defendant therefore had a verdict on the *non assumpsit*. The demurrer was subsequently argued, and judgment given for the defendant. The Master allowed the plaintiff the general costs of the cause on the issue as to the fraud, deducting from them the costs on the issue found for the defendant, and the costs of the demurrer:—*Held*, that the Master had properly allowed these costs:—*Held*, also, that a party entitled to the costs of the pleadings on any issue found for him, is entitled to all other expenses incidental to those pleadings. *Bird v. Higginson*, 278.

15. Where an issue is to be tried and a demurrer to be argued, the plaintiff need not delay trying his cause till the demurrer has been decided; and if the issue is found in his favour, and the demurrer is decided against him, though that demurrer may go to his right of action, he will still be entitled to the costs of the issue. *Id.*

16. Where one of several defendants succeeds in a suit, he is to be allowed not only his separate costs, but his portion of the joint costs, unless the Master is satisfied that he has been indemnified. *Gambrell v. Lord Falmouth*, 287.

17. Where the defendant has been entitled to certain costs, and these have been deducted from the plaintiff's costs, and an *allocatur* given for the balance of any money previously paid by the plaintiff to his attorney, such money must be deducted from the amount of the *allocatur*, and the lien of the attorney will be limited to the final balance. *Cain v. Adams*, 288.

COUNTY COURTS.—See COSTS, 8, 9, 10, 11, 12.

COVENANT.—See LANDLORD AND TENANT, 1.

CRIMINAL INFORMATION.

A rule nisi for a criminal information was discharged upon the affidavit of a person swearing to the truth of the libel. Upon subsequent affidavits shewing the entire falsehood of the former affidavit, that the person making it had been indicted for perjury, a true bill had been found, and that he had absconded, the Court re-opened the rule which had been discharged, and made it absolute. *The King v. Eve*, 450.

CRUELTY TO ANIMALS.—See TRESPASS.

CUSTOM.—See MANOR.

CUSTOM-HOUSE DUTIES.—See MANDAMUS, 3.

DESCENT OF ESTATE.—See ESTATE.

DISCHARGE OF PRISONER.

See PRACTICE, 23, 30, 55. PRISONER.

DISTRESS.

See JUSTICES OF THE PEACE. REPLEVIN. SEWERS. WARRANT OF JUSTICES.

DISTRINGAS.—See PRACTICE, III.

EASEMENT.—See Costs, 4.

1. A right to take water from the pond of another is a mere easement, and not a *profit à prendre*. *Manning v. Wasdale*, 431.

2. *Seemle*, that in an action by the occupier of an ancient messuage for the disturbance of such right, an averment that he was entitled "to wash and water his cattle in a certain pond, and to take and use the water thereof for culinary and other domestic purposes, for the more convenient use and enjoyment of the said messuage," would be, on general demurrer, a sufficient restriction of such right, even if it were a *profit à prendre*. *Id.*

ECCLESIASTICAL LAW.**See HABEAS CORPUS. PROHIBITION.**

Where the holder of a living has rendered that living voidable by the acceptance of another, but no proceeding has been taken to avoid it, the right of presentation will pass to a purchaser by the conveyance of the advowson, and such purchaser may at once avoid the living, and present his own clerk. *Alston v. Atlay*, 166.

EJECTMENT.—See COPYHOLD. LANDLORD AND TENANT, 1. LIMITATION OF ACTION, 4. MORTGAGE.**I. Service.**

1. Rule nisi for judgment against the casual ejector, granted in Trinity Term, when the declaration was served just previous to the term, and the notice required the tenant to appear in next Easter Term. *Doe d. All Souls College v. Roe*, 138.

2. If the notice at the foot of the declaration in ejectment is addressed to two persons who are joint-tenants, one only of whom is served, the rule for judgment against the casual ejector can only be for the premises in the possession of the one served. *Doe d. Hewson v. Roe*, 334.

3. Where four out of five parish officers were served in ejectment, the rule for judgment against the casual ejector can only be as to the premises in the possession of the four. *Doe d. Weeks v. Roe*, 335.

4. Service in ejectment on one tenant, of a declaration and notice addressed to another, is not good. *Doe d. Smith v. Roe*, 332.

5. Service of a declaration in ejectment on the landlord alone, of premises let by him in single rooms to weekly lodgers, is not sufficient, unless he occupies part of the house sought to be recovered. *Doe d. Hubbard v. Roe*, 333.

6. Rule granted to shew cause why service of a declaration in ejectment on the clerk of an incorporated company, should not be good service. *Doe d. Ross v. Roe*, 124.

7. Rule nisi granted for judgment against the casual ejector, where the tenant in possession was keeping out of the way, and service had been made on a person who kept the key of the premises. *Doe d. Childers v. Roe*, 121.

8. Service on an under-tenant of part of the premises, cannot be considered as service on a joint-tenant. *Id.*

9. A rule nisi for judgment against the casual ejector refused, although it was quite clear he had been keeping out of the way for some months before

the term, as the attempt to serve him was made only the day before the term. *Doe d. Brickdale v. Roe*, 333.

10. Rule nisi for judgment against the casual ejector refused, where the service was on the day before the term on a relation of the tenant, and the tenant on the second day of the term acknowledged he had received the declaration, but refused to say on what day. *Doe d. Finch v. Roe*, 334.

II. Other Matters.

11. Where a tenant attorned in 1801, but the person then claiming title never entered into possession, nor received rent; and the estate was, between 1801 and 1834, sold in several portions, and purchased by the tenant's wife, who continued in possession till nearly 1834, when ejectment was brought against her; this possession was held to be sufficiently adverse to justify the judge in nonsuiting the plaintiff in that ejectment. *Doe d. Linsey v. Edwards*, 139.

12. Though the tenant, when he signed the attornment, was only tenant of one part of the estate, and his wife subsequently purchased the other portions of it—that attornment was held properly receivable in the action against her, as part of the general evidence, as to the rights of the plaintiff with respect to the estate. *Id.*

13. In ejectment, after a writ of possession executed, and an action for mesne profits commenced, the Court set aside the judgment and execution on payment of all the costs incurred, at the instance of the landlord, who by a mistake had not had the copies of the declaration, which had been served on his tenants, delivered to him. *Doe d. Butler v. Roe*, 130.

14. Application granted in ejectment under the statute 1 Geo. 4, c. 87, s. 1, the tenant in possession being the assignee of the original lessee. *Doe d. Watts v. Roe*, 335.

ESCAPE.—See AMENDMENT, 1.**ESTATE.—See INCLOSURE, 4. POOR, 9. WILL.**

The son of one of two coparceners made partition by deeds of lease and release with the alienee of the other coparcener:—*Held*, that the son of the coparcener who made the partition had the same estate in the land as before, and took nothing as purchaser, and that therefore the descent *ex parte materna* was not broken. *Doe d. Crosthwaite v. Dixon*, 364.

EVIDENCE.

See PLEADING, 1. AMENDMENT, 1. BILL OF EXCHANGE, 2. EJECTMENT, 12. LIMITATION OF ACTION, 2, 3. PRACTICE, 66. STAMP. STATUTE OF FRAUDS, 2.

1. Neither the husband nor wife can be asked any questions which directly tend to prove non-access, or indirectly but necessarily lead to the same conclusion. *The King v. The Inhabitants of Sourton*, 209.

2. The letters of a person who in one year acted as the agent of a company, are not evidence to affect other persons who were members of that company in the preceding year, but who were not proved to be members of it at the time when the letters were written. *Jones v. Shears*, 43.

3. Whether a party who formerly held under a lease holds over, and continues tenant or not, is a question of fact for a jury. *Jones v. Shears*, 43.

4. The declarations of an insolvent made at the time of filing his schedule to obtain his discharge under the Act for the Relief of Insolvent Debtors, are not receivable in evidence in order to shew that a deed of assignment, executed by him some time previously, was so executed with the view or intention of petitioning for his discharge. *Peacock v. Harris*, 281.

5. In an action against one of two makers of a joint and several promissory note, the other maker of the note cannot be called as a witness for the defendant, to prove that the consideration given for the note is an illegal consideration. His interest in defeating the note altogether renders him incompetent. *Slegg v. Phillips*, 51.

6. Evidence of a promise to pay, made within the jurisdiction of a court baron, is not alone sufficient to maintain an action for goods sold and delivered there. Evidence of the consideration on which that promise was made must also be given. *Williams v. Gibbs*, 241.

7. Where, in an action on a bill of exchange, the plea shews the bill to have been an accommodation bill, but does not shew fraud in its inception, a plaintiff is not bound to begin by going into proof of consideration. *Lewis v. Lady Parker*, 46.

8. In assumpsit against the keeper of an office for the booking, receiving, and forwarding of parcels, who is not a carrier, for the loss of a parcel delivered to him for the purpose of being forwarded, it is not sufficient to raise even a *prima facie* case against him to shew the non-arrival of the parcel at the place of its address: some evidence must be given to shew his non-delivery of the parcel to a carrier. *Gilbert v. Dale*, 383.

9. In an action upon a bill of exchange purporting to have been drawn by A., resident abroad, upon B., resident in England; the plaintiff having proved that it was seen abroad immediately after the date of it:—*Held*, that it was not necessary, in order to shew that it was a foreign bill, also to prove that the bill was then in an unaccepted state. *Dempilliers v. Holden*, 394.

10. An allegation in a declaration, that a plaintiff was nonsuited in an action, is supported by proof that in a case standing first in the list, and depending on the same circumstances, the plaintiff was nonsuited, and that when the second case was called the judge intimated that he should nonsuit in the same way, and to save expense the jury were not sworn, but the clerk of the Court entered a judgment as in case of a nonsuit in his books. *Williams v. Gibbs*, 241.

11. In an action of ejectment it was proved, that on the occasion of a sale of the premises to the defendant, a feoffment of them was handed over to him by the then vendor, an attorney; that the parties to whose use the feoffment was made, had possessed them; and that after the execution of the feoffment, and after their possession, the premises had been in the possession of the vendor; the execution of the feoffment was attested by a witness, and there was an indorsement upon it of livery of seisin, also attested by a witness. At the trial an abstract of the feoffment

was produced by a witness, clerk to the vendor, who proved that it was made on the occasion of the sale, and had been in his possession ever since:—*Held*, that the defendant must be presumed to hold under the feoffment, and that not having, after due notice, produced it, the abstract was admissible in evidence; that it was not necessary to call the attesting witness to prove the execution, nor to give evidence of actual livery of seisin. *Doe d. Rowlandson v. Wainwright*, 391.

12. Where an executor, before a sale of the goods of a deceased testator, tells a legatee, that she may purchase to a certain amount (the amount of her legacy), and that such purchase shall be an off-set to her legacy: such a declaration amounts to a special contract as to the mode of payment, and may be given in evidence in an action for the value of the goods sold, brought by the executor, though the sale was by auction, subject to written particulars of sale. *Bartlett v. Pernell*, 16.

13. On an issue of payment of a sum of money in discharge, evidence was received of a check having been sent by the defendant to the plaintiff for the account, but describing it as a balance:—*Held*, that the question was properly put to the jury to say whether the check was tendered as money, and the jury having found that it was not, the Court refused a new trial. *Hough v. May*, 33.

14. To make a check amount to a payment, it must be unconditional. *Id.*

EXECUTOR.—See EVIDENCE, 12. PLEADING, 12. PRACTICE, 82. PROHIBITION, 3.

FIXTURES.—See TROVER.

FOOTWAY.—See HIGHWAY, 8.

FORCIBLE DETAINER.

1. Where a conviction on the statute 8 H. 6, c. 9, for a forcible detainer, had been quashed for want of any statement of an unlawful entry, the inquisition taken upon such conviction must also be quashed. *The King v. Wilson*, 225.

2. The magistrates acting under the statute having awarded restitution of the premises, this Court, on quashing the conviction and inquisition, is bound to award re-restitution. *Id.*

FRIENDLY SOCIETY.

See JUSTICES OF THE PEACE, 1.

GRAND JURY.

1. A grand jury must not consist of more than twenty-three persons. *The King v. Marsh*, 366.

2. More than twenty-three having been sworn in, the Court refused to quash an indictment found by them after the defendant had removed it by *certiorari*, and had taken his trial on it and been found guilty. *Id.*

3. On a motion to quash an indictment, the Court refused to listen to an affidavit made by a grand juror as to what passed in the grand jury room. *Id.*

GUARDIAN.

A father appointed two persons executors of his will, and also guardians of the persons and estates of his children, and requested them, according to their discretion, to cause his children to be properly brought up and educated:—*Held*, that this appointment gave the guardians the right to the custody of the children, and the Court therefore took them out of the custody of the grandfather and grandmother, against whom there was no objection whatever, and who, at the desire of the father, had come over from America to take care of them, and directed that they should be given up to the guardians. *The King v. Isley*, 196.

HABEAS CORPUS.

Habeas corpus to take a party, in custody under a writ *de continuance capiendo*, before an Ecclesiastical Court, to purge a contempt, refused by this Court to the party himself. *Ex parte Strong*, 292.

HIGHWAY. See OVERSEER, 1. PLEADING, 27, 28. STATUTE, 1.

1. The provisions of the General Turnpike Acts, 3 Geo. 4, c. 126, s. 51, and 4 Geo. 4, c. 95, s. 31, which exempt all persons from being rated in respect of any tolls or toll-houses, apply to the trustees of a road made under a local act: although such trustees are beneficially interested in the tolls, and although some of the provisions of the general acts, and of the local act, are inconsistent with each other. *The King v. The Trustees of the Great Dover Street Road*, 423.

2. Where a jury are impanelled under the General Turnpike Act, 3 Geo. 4, c. 126, to assess the value of the several interests of A., B., and C. respectively, in land taken by the trustees, the inquisition must specify the sum due to each respectively. *The King v. The Trustees of the Norwich and Watton Road*, 385.

3. The inquisition is the substantial and final part of the proceedings, cannot be altered by the order of the trustees, and a *certiorari* lies to remove the inquisition before their order has been made. *Id.*

4. *Semble*, that the inquisition should set out the notices given by the trustees. *Id.*

5. An act of parliament empowered certain trustees to make a main road and several branches. They made the main road and all the branches but one:—*Held*, that a district, liable by prescription to repair all highways lying within it, and through which part of the main road passed, was not liable to repair that part until the remaining branch was also completed. *The King v. The Inhabitants of the Lower Division of Cumberworth and Cumberworth-Half*, 439.

6. Under 55 Geo. 3, c. 68, the justices have no power to narrow a highway, or, in the same order, to stop up more than one highway. *The King v. The Inhabitants of Milterton*, 434.

7. An order purporting to stop up part only of a highway, or more than one highway, is *void*. *Id.*

8. Under 55 Geo. 3, c. 68, the diversion and the stopping up of a public footway, must each of them be the subject of a distinct order, and one order purporting to be both for the diversion and stopping up, is bad. *The King v. The Justices of Middlesex*, 407.

HUSBAND AND WIFE.

See EVIDENCE, 1. PLEADING, 17.

A person who has laid out money for indicting a husband for ill-usage of his wife, cannot recover it from the husband on an implied *assumpsit*. *Grindall v. Godman*, 339.

INCLOSURE.—See STATUTE, 5, 6.

1. The General Inclosure Act directs, that commissioners appointed under any private inclosure act shall, when about to set out "the boundaries of any parishes, manors, hamlets, or districts," give notices under their hands and seals, to be affixed to the doors of the churches of such parishes, and within one month after setting out the boundaries shall cause a description thereof to be left "at the place of abode of one of the churchwardens or overseers of the poor of the respective parishes," not adding manors, hamlets, or districts. A commissioner appointed under a local act gave the proper notices of his intention to the churchwardens of four several districts forming one parish. These churchwardens were elected separately by the different districts, but each was sworn to act for the parish. The commissioner then ascertained the boundaries, and gave a description thereof and a copy of his determination to a churchwarden of that district in which the parish church was situated:—*Held*, that he had sufficiently complied with the provisions of the statute; for though each district elected its own churchwarden, yet each churchwarden must be taken to be an officer for the whole parish. *The King v. Marsh*, 255.

2. The words of the statute having raised the difficulty, and the commissioner having acted with good faith, the Court declared that it should require very strong and convincing proof before it declared his act invalid. *Id.*

3. On an appeal against a poor rate, the question raised was, whether certain land was in a particular parish, which depended on whether the commissioners had properly decided as to a disputed boundary under the 3d section of the General Inclosure Act:—*Held*, that the sessions properly refused to hear evidence as to whether the preliminary notices were given prior to the adjudication, as required by that section. *Id.*

4. A local inclosure act, passed before the general statute 1 & 2 Geo. 4, c. 23, enacted, that the lands to be allotted and awarded, immediately after such allotments were made, should be, remain, and enure to the persons to whom they were allotted, who should from thenceforth stand and be seised and possessed thereof to such and the same uses, &c., as the several and respective messuages, &c., in lieu of which such allotments should be made, were held under. The commissioners appointed under this act set out an allotment to a person in lieu of certain open field lands and rights of common, and gave him possession of it, but did not execute their award until several years afterwards:—*Held*, that under the above section the legal estate passed immediately on the allotment being made, and before the award was executed. *Doe d. Harris v. Saunder*, 350.

INFERIOR COURT.

See EVIDENCE, 6. PRACTICE, 56, 78.

INN OF COURT.

The inns of Chancery are so far voluntary societies, that this Court possesses no power to compel them by mandamus to admit an attorney to be one of their members. *The King v. Barnard's Inn*, 62.

INQUISITION.

See **FORCIBLE DETAINER**, 1. **HIGHWAY**, 2, 3, 4.

INSOLVENT.

See **ASSIGNMENT OF PROPERTY**. **EVIDENCE**, 4.

A person, in order to obtain fresh credit, offered to give a warrant of attorney for the amount, as well as for an old debt, for which he had been discharged under the Insolvent Act, and on his solicitation the creditor was induced to take it and give the credit:—*Held*, that the warrant of attorney was not good for the amount of the old debt. *Smith v. Alexander*, 82.

INSPECTION OF DEEDS.—See **MANDAMUS**, 1.

INTERPLEADER.—See **PRACTICE**, IV.

IRREGULARITY.—See **PRACTICE**, V.

JUDGMENT.

1. A docket of the issue is not a docket of the judgment within 4 & 5 W. & M. c. 20, so as to give precedence to the judgment creditor over other subsequent charges on the land. *Doe d. Barron v. Purchas*, 50.

2. It is the duty of the plaintiff's attorney to see that the judgment is properly docketed. *Id.*

JUDGMENT AS IN CASE OF A NONSUIT.
See **PRACTICE**, VI.

JUDGMENT NON OBSTANTE VEREDICTO.
See **ARBITRATION**, 7. **PLEADING**, 29.

JUSTICES OF THE PEACE.

See **POOR**, 1. **SESSIONS**. **WARRANT OF JUSTICES**.

1. Where justices under the 33 G. 3, c. 54, s. 15, and the 49 G. 3, c. 125, s. 3, had heard the complaint of a man claiming to be a member of a friendly society, alleging that he had been unlawfully expelled, and that arrears were due to him, and they at first ordered him to be re-admitted, and then, on a subsequent hearing, made an order for payment of the arrears, and issued a warrant of distress against two persons as officers of the society:—*Held*, that an action of trespass was maintainable by one of these persons on whose goods the distress had been levied, all the facts necessary to give the justices jurisdiction not being distinctly found and set forth on the face of the warrant. *Day v. King*, 178.

2. Justices authorised by an act of parliament to proceed by warrant in execution, to enforce payment of rent to a company for gas supplied by that company, ought not to do so without a previous summons to the party against whom the warrant is to be issued. *Painter v. The Liverpool Oil Gas Company*, 233.

LANDLORD AND TENANT.

See **EVIDENCE**, 3. **STATUTE OF FRAUDS**. **TROVER**.

1. A lease contained a general covenant to repair, and also a special covenant by which the landlord

was empowered to enter and view the premises, and to give notice of repairs, and if the repairs were not made within a certain time, to enter and perform them, and charge the tenant with the expenses, and distrain for them as for rent. The lease contained a general covenant for re-entry in case of the non-performance of any preceding covenant as to rent, repairs, &c. The landlord gave notice of repairs; they were not made. He then gave notice, under the special covenant, that if not made within a certain time, he should enter and make them, and charge the tenant with the expenses. The tenant did not repair, and the landlord afterwards brought ejectment under the general covenant of re-entry:—*Held*, that he had, by the notice under the special covenant, waived his right of re-entry under the general covenant as upon a forfeiture for non-repair. *Doe d. De Rützen v. Lewis*, 162.

2. A tenant entered certain premises in May, but was to pay rent as from the 2d February preceding to the 2d February in the next year, after which he was to hold them as tenant from year to year. In October, 1833, he received a notice to quit "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said messuage, &c. shall expire, after the expiration of half a year from the delivery of this notice:—" *Held*, that the word "present" must have reference to the expiration of the year current after the time stated in the notice, or might be rejected altogether, and that the notice was a good notice for February, 1835. *Doe d. Williams v. Smith*, 176.

LIEN.—See **COSTS**, 17.

A person who is both town-clerk and solicitor to a corporation, may have in the latter character a lien on corporation papers. This Court will not issue a mandamus to such a person to deliver up books and writings said to belong to the corporation, if he claims as solicitor to have a lien on them. *The King v. Williams*, 275.

LIMITATION OF ACTION.

See **MORTGAGE**, 1.

1. *Assumpsit*, for unliquidated damages, is an action within the saving clause, s. 7, of the Statute of Limitations, 21 Jac. 1, c. 16. *Piggott v. Rush*, 28.

2. An acknowledgment in this form, "I acknowledge to owe Mr. James Morris the sum of 36*l.*, which I agree to pay to him as soon as my circumstances will permit me to do so," was held to be admissible in evidence, without any stamp, to take a case out of the Statute of Limitations. *Morris v. Dixon*, 57.

3. Where a part-payment is made by a party who owes a debt to another, and there is no proof of more than one demand existing between the parties, such part-payment, and the words accompanying it, may be referred to this one debt; and though the words used do not expressly mention any debt, it shall be sufficient to take it out of the Statute of Limitations. *Evans v. Davies*, 15.

4. Where there has been a continued possession of lands for twenty years, but not adverse, s. 15 of 3 & 4 Will. 4, c. 27, enables a party claiming to bring an action within five years after the passing of that statute. *Doe d. Burgess v. Thompson*, 451.

LUNATIC.—See PRISONER, 2.

MANDAMUS.

See INN OF COURT. LIEN. OFFICER, 7. PENSION, 1. PRACTICE, 43. RATE. SESSIONS, 8.

1. At the hearing of an appeal against an order of removal, the appellants, at the instance of the respondents, produced an assignment of the pauper as apprentice to a master in the appellant parish, but objected to its being given in evidence by the respondents, as it was not stamped. The Court of Quarter Sessions respited the appeal, that the respondents might apply to the Court of King's Bench for a mandamus to the respondents to produce the assignment to be stamped:—*Held*, that the instrument was not a document of a public nature, and that no mandamus would lie. *The King v. The Overseers of Westowe*, 446.

2. Certain burgesses who possessed the qualification required by 5 & 6 Will. 4, c. 76, s. 9, were objected to at the revision of the lists before the mayor and assessors, because they had not paid the shilling required by 2 Will. 4, c. 45, s. 56, and their names were thereupon expunged:—*Held*, that a mandamus does not lie for the insertion of the names. *The King v. The Mayor and Assessors of Hythe*, 455.

3. Where imported goods were taken possession of by custom-house officers, and the owner claimed them upon payment of a small *ad valorem* duty, as goods wrecked, but the officers, though that duty had been paid into the treasury, refused to deliver them up, except on payment of the full importation duty:—*Held*, that this Court would not grant a mandamus to compel the commissioners of customs to deliver up the goods, but left the party to pursue a civil remedy if the goods were wrongfully detained. *The King v. The Commissioners of Customs*, 247.

4. Where a party claiming a copyhold tenement cannot try his right without admission, the Court of King's Bench will compel the lord to admit him, even although another party has already been admitted. *The King v. The Lord of the Manor of Hexham*, 396.

5. Where an office is full by a void election, and the right to appoint to it cannot be tried in any other way, the Court will grant a mandamus to try the right. *The King v. The Minister, &c. of Stoke Dame-rel*, 346.

6. But where a person was appointed sexton of a parish by the minister, in whom the right to appoint *prima facie* is, the churchwardens refused to call a vestry meeting of the parishioners (who also claimed the appointment) to elect one, and it appeared that there was another method of trying the right; the Court refused to grant a mandamus to the minister and churchwardens to call the vestry meeting. *Id.*

7. Even although it was in the power of the person appointed sexton to prevent the other method of trying the right being resorted to, by refraining from claiming his fees, whereby the evidence of the right in the parishioners at large would in time be lost by the death of parties. *Id.*

8. The Court will grant a mandamus to compel parish officers to make a rate for relief of the poor, where two out of four of those officers refuse to concur in any rate which does not expressly state that certain inclosures are within a certain district in the

parish. *The King v. The Churchwardens of Edlaston*, 429.

9. The rule for such a mandamus is absolute in the first instance. *Id.*

10. A mandamus issued without opposition to the justices of W., directing them to enforce a conviction. A rule nisi having been obtained, calling on them to shew cause why they should not pay the costs of the application for the mandamus, of the mandamus, and of the rule, the Court held, that the circumstance of their not having opposed the application was no ground for subjecting them to costs, and discharged the rule with costs. *The King v. The Justices of Warwickshire*, 429.

11. *Semble*, that the application should have been made against the individual justices who acted in the matter. *Id.*

MANOR.

1. It is a good custom in a manor, for a person who holds an office connected with the manor, to take surrenders of copyholds concurrently with the steward. *Doe d. Stilwell v. Mellish*, 341.

MORTGAGE.—See POOR, 9.

1. The possession of a mortgagor is still, notwithstanding the 3 & 4 Will. 4, c. 27, a possession not adverse to the mortgagee; and therefore, where such possession had existed for more than twenty years, it was held, that no acknowledgment in writing under the 14th and 15th sections was required to take the case out of the statute, but that the mortgagee might recover under the 15th section notwithstanding such possession. *Doe d. Jones v. Williams*, 213.

2. A party applying for the assistance of the Court, under the 7 Geo. 2, c. 20, to compel a mortgagee to re-convey the mortgaged premises, must be the very party entitled to redeem, and the defendant in the ejectment, if such an action has been commenced. An authorised agent is not within the provisions of the statute. *Doe d. Hurst v. Clifton*, *Doe d. Orchard v. Stubbs*, 285.

NEW TRIAL.

1. A defendant gave due notice to the attorney for the plaintiff to produce a certain document. At the trial the attorney attended, and then for the first time stated that the document was not in his possession, whereupon the defendant was unable to prove his case, and the plaintiff obtained a verdict. Upon a motion for a new trial the plaintiff's affidavits stated facts, which, if proved, were an answer to the defendant's case, even if the document had been produced. The defendant's affidavits stated he had a good defence on the merits. The Court granted a new trial. *Doe d. Poole v. Errington*, 448.

2. The Court will not give a party the advantage of a new trial, merely because in his particular case the new rules for pleading may operate injuriously upon him, especially if he might have avoided such an effect by adopting a different mode of proceeding. *Serjeant v. Chafey*, 273.

3. No new trial will be granted on the ground that the verdict was against evidence, where the subject-matter of the action appears on the evidence to be less than 20*l.*, even where the verdict has been found for the defendant. *Haine v. Davy*, 30.

NOTICE OF ACTION.—See PLEADING, 23, 24.

OFFICER.—See INCLOSURE, 1. MANDAMUS, 5, 6, 7. POOR, 7. PRACTICE, 42.

1. The right to demand a poll is by law incidental to the election of a parish officer by show of hands, where there is no special custom to exclude it. *Campbell v. Maund* (in Error), 457.

2. A demand of a poll, not made until after the show of hands is declared to be in favour of one candidate, is good. *Id.*

3. If a demand of a poll to be taken in a particular way is made, and no objection is made to the taking of the poll at all, on the ground that the form of demand is irregular, and a poll is taken, it is a waiver of any irregularity in the form of the demand. *Id.*

4. In the parish of P., both before and after the passing of the 58 G. 3, c. 69, the mode of electing churchwardens had been by show of hands, no poll ever having been demanded; but it did not appear that there was any special custom to exclude a poll. —*Held*, that this parish was not exempted by the 8th section from the operation of that act, giving a plurality of votes according to property. *Id.*

5. A subsequent local act having enacted that the election of churchwardens should be conducted "in such manner as hath been usual in the same parish:" —*Held*, that a poll still must be taken by a plurality of votes, according to the 58 G. 3, c. 69, the mere fact of the votes never having been so taken being immaterial. *Id.*

6. Where an act of parliament created one parish out of a portion of another, and directed that the election of officers in the new parish should follow the mode adopted in the old parish:—*Held*, that this direction only applied to the mode of election then in practice in the old parish, and that if that mode was long afterwards declared to be illegal, and another substituted for it, the new parish was not bound to adopt the substituted mode. *The King v. St. James's, Westminster*, 253.

7. The Court will not, upon any general principle of law, compel parish officers to allow a rated inhabitant inspection of certain books of accounts, nor to permit him to take copies of the same where the acts under which those books are kept, do not distinctly give him the right to have such inspection and to take such copies. *The King v. St. Marylebone*, 261.

OVERSEERS.—See OFFICER.

1. The overseers and churchwardens of a parish have not such a special property in the highway books, kept by the parish surveyor, under the 13 Geo. 3, c. 78, s. 48, and the 58 Geo. 3, c. 69, s. 6, as to enable them to maintain trover against a surveyor who has gone out of office, but who refuses to deliver up the books. They must proceed against him under the provisions of these statutes. *Harrison v. Round*, 18.

2. A vote of a vestry authorising the payment to the overseers of costs incurred by them in defending their accounts, is bad, and an order of sessions allowing subsequent accounts, in which such payment formed one of the items, was quashed. *The King v. Johnson*, 201.

PALACE COURT.—See PRACTICE, 56.

PARTICULARS OF DEMAND.
See PRACTICE, 55, 66.

PARTITION.—See ESTATE.

PARTNER.

See ASSIGNMENT OF PROPERTY, 5. BILL OF EXCHANGE, 1, 2. EVIDENCE, 2.

PAYMENT.

See EVIDENCE, 12, 13, 14. LIMITATION OF ACTION, 3.

PENSION.

1. The Lords of the Treasury granted, under 3 Geo. 4, c. 113, a pension for life to a person whose office had been abolished. They afterwards, thinking they had no power to grant such a pension, revoked their warrant. The amount once appeared in the parliamentary estimates, because the item could not be withdrawn in time. It was afterwards withdrawn, and no money was ever received from parliament on account of the pension, the sum which had been once in the estimates having been applied to the ways and means:—*Held*, that no mandamus could go to the Lords of the Treasury to enforce the payment of the pension. *The King v. The Lords Commissioners of the Treasury*, 67.

2. The Lords of the Treasury had no power to grant such a pension. *Id.*

PEREMPTORY UNDERTAKING.

See PRACTICE, 35, 74, 75.

PERJURY.

See CRIMINAL INFORMATION. PRACTICE, 38.

PLEADING.

See EASEMENT, 2. EVIDENCE, 10. PRACTICE, 82. SCIRE FACIAS. SHERIFF, 5, 6.

I. General or Special Plea.

1. In an action of libel, plea, the general issue:—*Held*, that the defendant was not precluded by the rule of H. T. 4 Will. 4, r. 4, from setting up as a defence at the trial that the matter complained of was the subject of a privileged communication. *Lillie v. Price*, 381.

2. In *assumpsit* against carriers for the loss of a parcel, the defence that the value was above 10*l.*, not declared at the time of delivery, must be specially pleaded. *Syms v. Chaplin*, 411.

3. Debt on an attorney's bill for business done in conducting a suit at law. Pleas, *nunquam indebitatus*, and *set-off*, and money was paid into Court:—*Held*, that the defendant was not precluded by the rule of H. T. 4 Will. 4, r. 3, from giving in evidence a contract that the business should be done for "the money out of pocket." *Jones v. Reade*, 382.

4. In an action to recover the amount of an apothecary's bill, the proof required by the statute 55 Geo. 3, c. 194, s. 21, that the plaintiff is an apothecary, is a condition precedent to his right to recover. He must therefore give that proof, although the defendant has not put on the record any special plea founded on that statute. *Shearwood v. Hay*, 249.

5. Nor does it make any difference in this respect that the defendant has pleaded a tender as to part of the plaintiff's demand, though such plea is expressly pleaded to a count of the declaration where the work is said to have been done and the medicines furnished by the plaintiff as an apothecary. *Willis v. Langridge*, 250.

6. In trespass against overseers for taking goods as a distress for a poor's rate; a defence that the goods were not the property of the plaintiff may be given in evidence under the general issue, notwithstanding the new rules, *Haine v. Davey*, 30.

7. So it seems might any matter of defence. *Id.*

8. The 3 & 4 Will. 4, c. 52, s. 108, requires that previously to the unloading of goods carried coastwise, a written notice of the ship's arrival, signed by the master, shall be given to the collector or controller of customs, by the master, owner, wharfinger, or agent of the ship, and that certain documents should be obtained. In an action of *assumpsit* for demurrage:—*Held*, that non-compliance by the plaintiff with the above provisions, could not be given in evidence under the general issue. *Alcock v. Taylor*, 58.

9. A statutory objection of this description should be specially pleaded. *Id.*

10. *Quære*, whether the new rules extend to penal actions, so as to prevent a defendant in such an action from pleading not guilty, and *quære* whether such plea would bind the plaintiff in such action to prove all the matters necessary to constitute the offence. *Faulkner v. Chevall*, 183.

11. *Assumpsit* for work and labour and materials, alleging in the usual form a promise to pay on request. Plea, that the work and labour had been done and the materials furnished under an agreement that the plaintiff should receive nothing if the work should turn out to be useless, and that it had done so:—*Held*, that this plea was bad upon special demurrer, as amounting to the general issue. *Hayselden v. Staff*, 204.

II. Other Matters.

12. In actions by executors, all who are named in the will may join, though some only of them have proved; and it makes no difference that issue is raised on a plea of *ne unques executor*. *Scott v. Briant*, 54.

13. The omission from a plea of the *actio non*, and prayer of judgment, is no ground of demurrer where a plea goes to the commencement of the action, whether it is pleaded to a part or the whole of the declaration. *Benmore v. Neck*, 178.

14. Where to an action of assault and battery, the defendant pleads a conviction and certificate under the 9 Geo. 4, c. 31, s. 27, 28, he must state the names of the justices before whom the proceedings under that statute occurred. *Id.*

15. A plea of tender merely admits the defendant's liability on the contract to the amount tendered. *Willis v. Langridge*, 250.

16. In *assumpsit* for goods sold and delivered, the plaintiff pleaded, first, *non assumpsit* as to all except a sum of 4*l.* 9*s.* 5*d.*; secondly, a tender as to 3*l.* 9*s.* 5*d.*, parcel, &c.; thirdly, payment of 1*l.* In neither plea was it stated whether the tender was made before or after the payment. The second plea was

specially demurred to:—*Held*, that it was sufficient. *Jones v. Owen*, 191.

17. A replication to a plea of coverture, that the plaintiff's husband had been abroad for seven years, and was not known by the plaintiff to be living within that time, is bad. *Lake v. Ruffle*, 203.

18. To a declaration in *assumpsit* on a promissory note, the defendant pleaded that the note was given upon an agreement between the plaintiff and himself, in consideration of certain money and goods then agreed by the plaintiff to be thereafter lent and advanced and supplied to the defendant, and that the plaintiff did not perform the said agreement. The plaintiff replied *de injuriâ*:—*Held*, a good replication. *Watson v. Wilkes*, 187.

19. In *assumpsit*, the declaration stated the terms of a certain agreement of demise between A. and the defendants, that A. afterwards died, and plaintiff entered into possession; that defendants, in consideration that plaintiff would permit them to hold and enjoy the premises, agreed to perform the conditions then agreed upon, and also the conditions according to the tenor and effect of the first agreement. Allegation, that defendants did hold, &c. Breach, non-performance of the conditions. Plea, non-*assumpsit*:—*Held*, that upon this record the plaintiff was bound to shew what the conditions on the first agreement were, and not being able to do so was rightly non-suited. *Wallis v. Broadbent*, 40.

20. Declaration in replevin in the common form. The avowry justified the taking of the goods for rent; the plea in bar stated, that after the distress, and before the impounding, a tender of the rent was made and refused, and the goods were detained, as in the declaration stated:—*Held*, that this was no departure, the detention after tender made being a new taking. *Evans v. Elliott*, 231.

21. To an action of debt upon the 22 Geo. 2, c. 46, s. 14, against a deputy clerk of the peace for a borough, for acting as an attorney at the borough sessions, the defendant pleaded that he was not at any of the said times, &c. deputy clerk of the peace &c., nor did he commit any of the said supposed offences, &c.:—*Held*, bad on special demurrer. *Faulkner v. Chevall*, 183.

22. In case against the clerk of certain commissioners under a local act, the declaration stated, that the plaintiff advanced to the commissioners a sum of money for the purchase of an annuity, and that five of the commissioners, by a grant made according to the form of the statute, did by virtue of the act grant an annuity out of the rates granted and to arise by virtue of the act, and that afterwards a quarterly payment of the annuity became due, and that the commissioners had in their hands, out of the rates granted by the act, more than sufficient to pay it, and that it became their duty to pay it, but that they did not:—*Held*, 1st, that a plea, traversing the commissioners' duty to pay the quarterly payment, was bad on special demurrer:—2d, that it was not cause of general demurrer to the declaration that there was no averment that the money was advanced to the commissioners for the purposes of the act, or that there was no averment that the commissioners had sufficient to pay all demands on the rates. *Cane v. Chapman*, 355.

23. The local act enacted, that the commissioners might sue and be sued in the name of their clerk, for

or concerning any thing which shall be done by virtue or in pursuance of the act; and also by another section enacted, that no action should be brought for any thing done in pursuance of the act, until fourteen days' notice had been given to the clerk:—*Held*, that an action for the non-payment of the annuity was concerning a thing done in pursuance of the act, and was properly brought against the clerk, as the section authorising actions to be brought against the clerk was not to be construed as limited to acts of malfeasance or misfeasance only. *Cane v. Chapman*, 355.

24. *Semble*, it is not necessary that fourteen days' notice should be given of such an action. Per *Cole-ridge, J.* *Id.*

25. Case for neglect of duty is the proper form of action, as an action of contract is not maintainable either against the five commissioners who granted the annuity, or the whole body, they not being personally liable, and the credit having been given to the rates. *Id.*

26. Assumpsit against the defendant as acceptor of certain bills of exchange. Plea, that after the bills were accepted and became due, the defendant, resident in and subject to the laws of Scotland, in consideration that his creditors should forbear to sue, by his deed, made according to the law of Scotland, assigned his personal property within Scotland to J. D., for the use of his creditors; that notice of this deed was given to the plaintiff; that the plaintiff appointed by a writing, valid according to the law of Scotland, H. R. as his attorney to concur in the deed and receive dividends; that H. R. did concur and act therein; that other creditors accepted the assignment in satisfaction of their debts; that since the assignment funds have become available under it sufficient to pay all the creditors; that all the proceedings were in conformity with the law of Scotland; by reason of which premises, and the effect of those laws, the defendant has become discharged of the causes of action. Replication, that the defendant has not become discharged *modo et forma*:—*Held*, first, that by this replication the law of Scotland was put in issue; secondly, that the plea did not disclose a defence at English law. *Woodham v. Edwards*, 443.

27. A plea to an indictment against a parish for non-repair of a road, must point out distinctly the persons bound to repair. *The King v. The Inhabitants of Eastington*, 373.

28. A plea that a road is in a particular township, and that the inhabitants of the township have been used, &c. to repair all roads within it which otherwise would be repairable by the parish at large, and that by reason of the premises the inhabitants of the township ought to repair the road, is bad for not averring that the road, but for the alleged custom, would be repairable by the parish. *Id.*

29. A verdict having been given for the defendants on such a plea, judgment *non obstante veredicto* cannot be given for the Crown, as it does not appear that the parish is liable to repair. *Id.*

30. In trespass *quare clausum fregit*, two pleas, one of which justifies the trespass under a custom for an unqualified right of entry, the other under a custom for a right of entry subject to compensation, cannot be pleaded together. *Bastard v. Smith*, 428.

POOR.—See SESSIONS.

1. Where two justices of a county have concurrent jurisdiction with the justices of a city, which is not a county of a city, they may, though they have not qualified as justices for such city, sign an allowance of the indentures of a pauper bound apprentice by the overseers of a parish within the city to a person residing in a town within the county. And such allowance by them alone will be good under the 56 Geo. 3, c. 139. *The King v. The Inhabitants of Witney*, 150.

2. The party relying upon the indenture at the sessions need not prove notice to the overseers of the parish into which the pauper was bound apprentice. The want of notice should have been proved at the sessions by the other party. The allowance by two justices raised the presumption, that all that the statute required to be done before such allowance was made had been properly done. *Id.*

3. Where a parish apprentice leaves the service of his original master and enters the service of a second master, there must be, for the purpose of the apprentice gaining a settlement under such second service, a clear assent by the first master to the particular service with the second master. *The King v. The Inhabitants of Maidstone*, 198.

4. An assent given since the 56 Geo. 3, c. 139, where the assignment was without the consent of the justices, is not good by relation back. *Id.*

5. A man who was a carpenter and occupier of land, was applied to by another to permit him to succeed a then apprentice he had. The master said, he would take no more apprentices unless they would work on the land as well as at the trade, and that he would take him to do work as a servant. It was agreed that the pauper should live with the master for three years and learn the business of a carpenter, and do any other work he required him to do. The master was to pay weekly wages, and for over-work. —*Held*, that this was a defective contract of apprenticeship, and not a contract of hiring and service. *The King v. The Inhabitants of Ightham*, 7.

6. L. agreed on behalf of his son, that he should serve M. from the date of the agreement till a time mentioned, M. paying, at the expiration of the said term, 5*l.* to the son. L. to find his son clothes, washing, and all other necessaries, and M. meat, drink, and lodging:—*Held*, that this was a contract of hiring and service. *The King v. The Inhabitants of Billingham*, 419.

7. The rector of a parish sent for H. S. on a Sunday, and requested him to perform the duty of clerk for that day. He did so, and the rector, on coming out of the desk, said to him, "I shall appoint you my regular clerk and sexton, and to follow me in marriages and funerals:—"*Held*, that H. S. was thereby regularly appointed parish clerk, and that by serving the office he gained a settlement. *The King v. The Inhabitants of Bobbing*, 418.

8. Where a building contains under one roof three floors, each entered by a separate outer door, though one of the rooms on the middle floor cannot be entered but by going along or across a passage belonging to the upper floor, the occupier of such middle floor gains a settlement by renting, under 6 Geo. 4, c. 57. *The King v. Great and Little Usworth and North Biddick*, 100.

9. A testator purchased land in the parish of A. and mortgaged it, and by will devised it to trustees in trust for sale, and to apply the proceeds in payment of his debts, and the residue to his wife for her own use and benefit:—*Held*, that under this devise the wife had an equitable estate in the land itself, such as to confer a right to a settlement: that actual residence on the land itself was not necessary, residence in the same parish being sufficient: that the occupation of the land by the trustees under the will was not an adverse possession by them against her, and that evidence as to the value of the land, with the view of proving that there would be no residue after payment of the debts, was immaterial, the question being what estate the wife took under the will, and not what was the value of that estate. *The King v. The Inhabitants of Aslackby*, 217.

10. A pauper met with an accident in the parish in which he was residing, but in which he was not settled:—*Held*, that he was a person coming to settle in that parish, within the 13 & 14 Car. 2, and removable, and that the accident was an infirmity, within the 35 Geo. 3, c. 101, which gave power to justices to make an order of suspension, and charge the parish in which he was settled with the expenses. *The King v. The Inhabitants of Oldland*, 4.

11. A pauper, under such circumstances, could not be considered as casual poor. *Id.*

12. If the overseers of the poor of one parish occupy premises in another parish, they are liable to be rated in the second parish for such premises, though they are occupied solely for the benefit of the poor. *The Governors of the Poor of Bristol v. Wait*, 70.

13. A notice of appeal against an order for the removal of three children, the issue of the wife of a pauper by a former marriage, simply stated the names of the children, the fact that they were under thirteen, and named the parish in which they were settled; such notice was held sufficient under sect. 81 of the 4 & 5 Will. 4, c. 76. *The King v. The Justices of Cornwall*, 157.

14. The examination of a pauper stated a settlement by hiring and service. The notice of the grounds of appeal set out an exception in the hiring for two days' holiday at Spalding club feast:—*Held*, that the appellants could not, under such notice, give evidence of an exception for one day's holiday at Holbeach fair. *The King v. The Inhabitants of Holbeach*, 414.

15. *Seem*, that the notice would have been sufficient, although it had contained no mention of the time or place when the holidays were to have been enjoyed. *Id.*

16. A pauper (whose settlement was derivative) stated in his examination before the magistrates who made the order, that his father belonged to the parish of C., as he had heard him say, and also that he had heard him say that he was a certificated man from C.:—*Held*, that the respondent parish might give evidence of a settlement gained by the pauper's father in C. by apprenticeship. *The King v. The Inhabitants of Kelvedon*, 415.

17. Under 4 & 5 Will. 4, c. 76, the respondent parish is not bound to communicate any information relative to the settlement intended to be relied on, other than that contained in the examination. *Id.*

PRACTICE.

See AMENDMENT. ATTORNEY. CERTIORARI. COSTS, 7, 15. CRIMINAL INFORMATION. JUDGMENT. MANDAMUS, 9. NEW TRIAL. PLEADING, 29, 30. RULES OF COURT. SESSIONS, 10, 11. SHERIFF, 1.

I. Affidavit.

1. An affidavit of debt stating the defendant is indebted to the plaintiff "in the sum of 500*l.* for principal monies due on a bill of exchange," but not stating the amount for which the bill was drawn, is bad. *Fowell v. Petre*, 379.

2. In an affidavit of debt, by the indorsee against the maker of a promissory note, it is not necessary to state that the defendant is indebted to the plaintiff "as indorsee." *James v. Trevanion*, 332.

3. It is also unnecessary to state the default of the indorsers. *Id.*

4. An affidavit of debt for the agistment of cattle, must state it to have been "at the request of the defendant." *Smith v. Heap*, 89.

5. An affidavit by an attorney's clerk, stating the residence of his master, but not his own, is sufficient. *Stricks v. Blanchard*, 329.

6. It cannot be presumed that an affidavit made by a baronet, who is party in a cause in which the affidavit is intituled, is made by the person who is the party merely from the identity of the name and addition. *Doe d. Taylor, Bart. v. Meeks*, 135.

II. Bail.

7. The affidavit of justification of bail, given under the rule of T. T. 1 W. 4, must have the addition and residence of the deponent, as required by the rule of H. T. 2 W. 4. *Brown's bail*, 291.

8. Where the affidavit of justification of bail did not comply with the rule of T. T. 1 W. 4, from not stating the value of the different descriptions of the bail's property, and the bail were allowed:—*Held*, that the plaintiff was not entitled to the costs of opposition. *Rout's bail*, 291.

9. Where a defendant is a prisoner, a two days' notice of putting in and justifying bail at the same time, need not state that the defendant is a prisoner. *Pierce's bail*, 290.

10. Notice of bail given under the second rule of T. T. 1 W. 4, must not only state the residence of the bail for the last six months, but also aver such was the residence during that time. *Holling's bail*, 290.

11. Notice of bail, stating the residences for the last six months to be as follows, and then describing one of the bail, as of one place, and now residing at another, is sufficiently positive as to where that one has resided. *Park's bail*, 134.

12. Notice of bail, describing one of the bail by the initial only of his second christian name, held bad. *White's bail*, 134.

13. A defendant cannot justify bail in vacation, under 11 G. 4 and 1 W. 4, c. 70, s. 12, not having been noticed to do so by the plaintiff, under the rule H. T. 2 W. 4, I. 17. *Berratt v. James*, 128.

14. It is no objection to bail justifying that an alteration in the name of one of them appears to have been made in the bail-piece, the initials of the commissioner who took the bail being in the margin. *Haywood's bail*, 289.

15. If only one bail appears, he cannot justify. *White's bail*, 134.

III. Distringas.

16. An hour must be appointed as well as the day, when the second and third calls are to be made previous to moving for a distringas. *Atkinson v. Clean*, 301.

17. Distringas for the purpose of proceeding to outlawry granted, although three calls had not been made at the defendant's place of abode. *Harding v. Manners*, 80.

IV. Interpleader.

18. The Court refused to give a sheriff relief under the Interpleader Act, where a *fi. fa.* was delivered to him two months before notice of a fiat having issued against the defendant, and no reason was assigned for the delay in the execution. *Lashmar v. Claringbold*, 87.

19. Goods having been seized and sold under an execution, and the proceeds paid over to the execution creditor, the sheriff cannot apply to the Court for relief under the Interpleader Act, though he had no notice of the claim until after the sale. *Inland v. Bushell*, 118.

20. In an action in case for an obstruction in collecting tolls of a mine, with a count in trover for the ore, against the adventurers who claimed an interest in the ore, but disclaimed as to the tolls:—*Held*, that the Court could not entertain an application by the defendants under the Interpleader Act. *Lawrence v. Matheus*, 123.

21. Where an issue is directed under the Interpleader Act, and the claimant refuses to proceed to trial, another claimant cannot be substituted as party to the issue, without calling on the first claimant to shew cause against it. *Lydall v. Biddle*, 302.

22. An issue having been directed under the 6th section of the Interpleader Act by a judge at chambers, and no objection made to the want of jurisdiction of the judge:—*Held*, that it must be considered as an issue under the act, made by consent of the parties, and that therefore it was necessary to apply to the Court for a rule for the costs of trial. *Matheus v. Sims*, 298.

V. Irregularity.

23. An application to discharge a defendant for a defect in the affidavit to hold to bail, was made before a judge at chambers ten days after the detainer, and afterwards to the Court nine days later:—*Held*, that the application to the Court was made too late. *Fowell v. Petre*, 379.

24. A mistake in the copy served of a writ of summons, in the year of the king's reign in the *teste*, is merely an irregularity. *Edwards v. Collins*, 298.

25. An application by the defendant to set aside a declaration, on the ground of its not being dated on the day on which it was delivered, not made until the defendant has notice of the plaintiff having taken a subsequent step, is too late. *Newnham v. Hanny*, 303.

26. It is no excuse for not making a motion to set aside a declaration for irregularity within four days, that the delay was owing to the defendant's attorney having been changed. *Golding v. Scarborough*, 94.

27. The plaintiff gave notice that he should proceed to trial notwithstanding an agreement to refer the cause, and accordingly proceeded to trial, and obtained a verdict:—*Held*, that the defendant was not bound to move to set aside the trial, until he had notice of the plaintiff having taken a subsequent step in the cause. *Williams v. Gwynne*, 312.

28. An application to set aside an interlocutory judgment for irregularity, not made until after a rule to compute was obtained, is too late. *Grant v. Flower*, 326.

29. A plaintiff having offered to abandon an irregular judgment he had signed, but not having actually struck it out, the defendant should not apply to the Court to set it aside. *Robinson v. Stoddart*, 314.

30. If a plaintiff omits to charge a prisoner in execution within the proper time, it is more than a mere irregularity, and therefore application to discharge him may be made at any time afterwards. *Colbron v. Hall*, 316.

VI. Judgment as in case of Nonsuit.

31. A cause having been once taken down for trial, after which a new trial was granted, and a fresh notice of trial given, the defendant cannot have judgment as in case of nonsuit. *Hawley v. Sherley*, 331.

32. Where a cause is tried and verdict found for the plaintiff, who afterwards consents to a new trial, but neglects to try the cause, the defendant cannot have judgment as in case of nonsuit. *Brough v. Scarby*, 139.

33. Issue was joined in a country cause in Easter vacation and no notice of trial was given for the next assizes:—*Held*, that the defendant might move for judgment as in case of nonsuit in Michaelmas Term. *Robinson v. Taylor*, 304.

34. The Court will not discharge a rule for judgment as in case of nonsuit, where the sum sought to be recovered is small, because the defendant will not consent to a *stet processus*. *Milstead v. Nursey*, 293.

35. After a peremptory undertaking to try at a particular time if the cause is made a *remanet*, on account of the sudden illness of a judge, and the plaintiff does not apply for the enlargement of his peremptory undertaking, the defendant is entitled to judgment as in case of nonsuit. *Ward v. Turner*, 90.

36. The defendant having irregularly signed judgment of *non-pros*, by which the plaintiff was prevented proceeding to trial according to his notice, the defendant cannot have judgment as in case of nonsuit for the default. *Howell v. Jacobs*, 331.

VII. Rules.

37. Where an award directs that three defendants should each pay one third of certain costs, it is necessary to have separate rules for attachments for non-payment. *Doe d. Hodgson v. Summerfield*, 291.

38. A rule for a new trial, on the ground of surprise on the plaintiff, was made absolute on payment of costs within a certain time; if not paid, then the rule was to be discharged with costs. The plaintiff

did not pay the costs within the time, but preferred an indictment for perjury committed by the defendant in his affidavit, in opposition to the rule for a new trial:—*Held*, that proceedings for the enforcement of the costs of the rule could not be stayed until after the trial of the indictment. *Taylor v. Slings*, 327.

39. It cannot be made part of a rule for setting aside a warrant of attorney to secure an annuity, that proceedings against the sheriff for a false return to an execution on the judgment on the warrant of attorney should be stayed. *Cassel v. Lord Glengall*, 313.

40. A rule cannot be granted in the alternative for the plaintiff to find security for costs within a certain time, and if not for the defendant to sign judgment as in case of nonsuit. *Kelly v. Brown*, 315.

41. The Court will not grant a rule in the alternative, calling on an attorney to shew cause why he should not deliver up certain papers before a certain day, and if not, why an attachment should not issue. *Roscoe v. Hardman*, 118.

42. It seems, that in a case where a parish is concerned, if a rule is obtained while certain persons are in office, but is not discussed till their time of office has passed, and other persons have been elected and sworn in, this Court will make the new officers parties to the rule, to enable them to shew cause against it. *The King v. St. James, Westminster*, 253.

43. On moving for a rule nisi for a mandamus to the steward of a manor, to inrol a deed under the stat. 3 & 4 W. 4, c. 74, s. 53;—*Seem*, that it is not necessary to attach a copy of the deed to the affidavit on which the rule is moved. *The King v. Lunn*, 314.

VIII. Service of Rules, &c.

44. Where a defendant refused to take the copy of an award, rule, and allocatur, which were tendered him, the Court granted a rule nisi for an attachment. *Ellis v. Giles*, 329.

45. Service of a rule to compute on a servant at the house of the defendant, who had left his house a month previously, is sufficient. *Thomas v. Lord Ranelagh*, 336.

46. Service of a rule to compute, at the last place where the defendant was known to have lodged, but which he had left, and by sticking it up in the King's Bench office, is sufficient. *Black v. Cloup*, 297.

47. Service of a rule to compute on the landlady of the house where the defendant lodged, is not sufficient. *Salisbury v. Sweetheart*, 336.

48. Service of a rule to compute on "a workman at the house of the defendant," is not sufficient. *Hitchcock v. Smith*, 336.

49. Notice of an application under the Small Debtors' Act, left with a servant at a lodging house, is not sufficient. *Biddulph v. Gray*, 335.

50. An objection to such a notice is not waived by appearing to shew cause against the rule. *Id.*

IX. Miscellaneous.

51. It is necessary that some residence of the defendant should be stated in a writ of *capias*. *Margison v. Tugghe*, 85.

52. A defendant who has been improperly arrested on a *capias* and discharged, but without the terms of entering a common appearance, cannot treat the *capias* as if he had been served with a writ of summons, and therefore cannot enter an appearance, and demand a declaration. *Wickens v. Parker*, 137.

53. An agreement to refer a cause to arbitration, may operate as a stay of proceedings, although it is not part of the agreement that it should so operate. *Williams v. Gwynne*, 312.

54. If a plaintiff has lost a trial at the first sittings in a term by bail not having been put in in due time, but might have proceeded to trial at the last sittings, it is not such a loss of a trial as will entitle him to have an attachment against the sheriff stand as a security under the rule H. T. 2 W. 4, V. *The King v. The Sheriff of Shropshire*, 319.

55. The Court will not discharge a defendant out of custody, though in an ill-state of health, and though it appears by the plaintiff's particulars of demand that all the cause of action is barred by the Statute of Limitations. *Merceron v. Merceron*, 380.

56. If a defendant has been arrested by process out of the Palace Court, and the cause has been removed into the King's Bench, the bail below cannot render the defendant to the county gaol, under the statute 11 G. 4 and 1 W. 4. c. 70, s. 21. *Scaith v. Brown*, 322.

57. Such an irregular render is not waived by the plaintiff declaring *de bene esse* against the defendant as in the custody of the marshal. *Id.*

58. The Court, however, set aside a rule for a *procedendo*, on the application of the bail, on the payment of costs. *Id.*

59. Where imparlances are abolished, notice to plead is still necessary, before the plaintiff can sign judgment for want of a plea. *Fenton v. Anstice*, 125.

60. The defendant may deliver his plea at the same time that he serves a rule to change the venue, though the plea is one which will prevent the plaintiff from bringing back the venue on an undertaking to give material evidence in the original county. *Phillips v. Chapman*, 301.

61. If a defendant deliver a set of pleas which are bad for want of counsel's signature, whereupon the plaintiff signs judgment before the time for pleading expires, that judgment is irregular. *Smith v. Rathbone*, 330.

62. After the defendant has had time to plead on the terms of pleading issuably, he is not precluded from demurring specially to the replication. *Barker v. Gleadow*, 113.

63. The plaintiff having given notice of trial, the defendant cannot sign judgment of *non-pros* for not entering the issue. *Howell v. Jacobs*, 331.

64. A plaintiff having given notice of trial for an earlier sittings than he was obliged to do, did not countermand it, and did not proceed to trial, but gave a fresh notice for the subsequent sittings:—*Held*, that the second notice, and a trial under it, were regular. *Fell v. Tyne*, 299.

65. A plaintiff having given notice of trial for an earlier sittings than he was obliged to do, did not go to trial or countermand his notice, but gave a fresh

notice for the sittings when he was bound to go to trial:—*Semble*, that the defendant is not entitled to judgment as in case of nonsuit. *Ranger v. Bligh*, 299.

66. If a particular of set-off which is voluntarily delivered is intitled in the wrong Court, the defendant is not thereby precluded from giving evidence on his plea. *Lewis v. Hilton*, 314.

67. Where a judge tells a jury that if a certain fact is found one way the verdict must be for the plaintiff, but if the other, for the defendant, and such fact is found in the manner first supposed, the verdict must be entered for the plaintiff, though some of the jury should dissent at the time from such a construction of the finding, and the Court will not afterwards allow such entry of the verdict to be disturbed. *Doe d. Lewis v. Baxter*, 264.

68. This Court will not take notice of a short-hand writer's notes of a judge's summing up, though verified by affidavit; it will only refer to the notes of the judge himself. *Serjeant v. Chafey*, 273.

69. A judgment signed but not completed by taking in the roll until some time afterwards, is to be reckoned as a judgment of the time when it was signed. *Colbron v. Hall*, 316.

70. The rule of H. T. 4 Will. 4, s. 3, prevents a judgment signed in vacation being considered as a judgment of the previous term, so that that term cannot reckon as one of the terms within which a plaintiff must charge a prisoner in execution, by the rule H. T. 2 W. 4, I. 85. *Id.*

71. An interlocutory judgment signed in debt on a promissory note, is not irregular. *Mackenzie v. Gayford*, 330.

72. Sixty actions having been brought upon a policy of insurance, a consolidation rule was entered into, by which the plaintiff and defendants agreed to be bound by the verdict in one of them. The verdict in that action was found for the plaintiff, but a rule nisi was obtained by the defendant for a new trial. The plaintiff then, on the ground that by reason of the arrear of business in the Court the rule for a new trial could not come on for a long period, and that during that time the plaintiff lost the advantage of the interest, and incurred great risk as to the principal, obtained a rule nisi for the defendants to pay the whole amount insured into Court, or invest it as the Court should direct. The Court, however, discharged the rule. *Ohrly v. Dunbar*, 434.

73. A defendant having neglected to deliver the demurrer books, according to the rule of Court, the Court granted a rule nisi for judgment. *Somers v. Miller*, 117.

74. A peremptory undertaking having been several times enlarged, can only be again enlarged for the same cause on payment of costs. *Baron de Reutzen v. John*, 331.

75. The Court will not enlarge a peremptory undertaking, on the ground that a witness is fearful his evidence might prejudice his interest in a matter pending before the House of Lords. *Muston v. Tabard*, 138.

76. A rule to compute may be made absolute, although the judgment has been improperly signed. *Doeley v. Burton*, 138.

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77. A summons before a judge at chambers, returnable at a time when it is well known no judge sits at chambers, cannot be treated as a nullity. *Byles v. Walker*, 302.

78. Where the damages laid in the declaration are exactly 20*l.* it is not necessary to enter into the recognizances required by 19 Geo. 3, c. 70, s. 6, and 7 & 8 Geo. 4, c. 71, s. 6, on removing the cause out of an inferior jurisdiction, even though the defendant knows that a less sum is sought to be recovered. *Brady v. Veeres*, 320.

79. Rule absolute, in the first instance, to increase the issues on the return of a distringas on a late sheriff to sell goods seized under a *fi. fa.* *Nowell v. Underwood*, 300.

80. On the defendant being arrested, he agreed to a judge's order to stay the proceedings for a time, at the end of which the plaintiff was to be at liberty to sign judgment: the plaintiff cannot afterwards tax costs without giving notice, as if the defendant had not appeared; but not having done so, the Court will not set aside the judgment and execution as irregular. *Lloyd v. Kent*, 130.

81. A *ca. sa.* having issued, on which the sheriff sent his mandate to the bailiff of a liberty, who obtained time to make his return, after which the sheriff returned *cepi corpus*:—*Held*, that the bailiff was entitled to have the rule to make a return discharged. *Jackson v. Taylor*, 135.

82. An action against executors, who pleaded *plene administravit*, was referred to arbitration, pending which a third person recovered judgment by default against them in another action; the Court then allowed this judgment to be pleaded as a *plea puis darrein continuance* before the arbitrator. *Alder v. Parke*, 78.

PRISONER.—See PRACTICE, 23, 30, 55.

1. A prisoner who has been in custody in execution for more than twelve months for a debt less than 20*l.*, is entitled as of right to his discharge under the 48 Geo. 3, c. 123, though he has previously, when brought up under the compulsory clause of the Lords' Act, refused to deliver in a schedule. *Clay v. Bowler*, 283.

2. The application for the discharge may, if the prisoner himself is a lunatic, be made by his next friend, though no commission of lunacy has issued, nor any committee been appointed. *Id.*

3. In trover for a barge, a verdict was given for the plaintiff with 90*l.* damages, which was reduced by consent to a nominal sum of 40*s.*, for which judgment was entered, and the barge was returned:—*Held*, that the defendant was entitled to be discharged under the Small Debts' Act. *Smith v. Preston*, 93.

PRODUCTION OF DEEDS.

See MANDAMUS, 1. NEW TRIAL, 1.

PROHIBITION.

1. After sentence in the Ecclesiastical Court, the Court will not grant a prohibition, unless it is shewn clearly that there was a total want of jurisdiction. *Hart v. Marsh*, 341.

2. In a suit in the Ecclesiastical Court, to deprive a clergyman of his living, some of the articles charged

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him with offences cognizable at common law, which were not objected to in the progress of the suit. The sentence found that the articles were for the most part proved. The Court refused after sentence to grant a prohibition. *Hart v. Marsh*, 341.

3. Prohibition lies to a Spiritual Court if it proceeds to hear exceptions to the inventory exhibited by an executor, even although the exceptions be filed by a legatee. *Griffiths v. Anthony*, 398.

4. A significavit on the sentence of an Ecclesiastical Court having been set aside by the Court of Chancery, for an ambiguity appearing in the sentence, and no subsequent proceedings having been taken, and there appearing no intention to proceed, the Court refused a prohibition applied for, on the ground that no good significavit could issue on such a defective sentence. *Bodenham v. Ricketts*, 132.

5. A prohibition lies to an Ecclesiastical Court, where the question of custom or no custom is distinctly raised on the face of the libel and answer. *Rhodes v. Oliver*, 38.

PROMISSORY NOTE. See **BILL OF EXCHANGE**, 3.

An instrument in form "On demand I promise to pay to J. G. J., or order, the sum of 120l., with lawful interest for the same, for value received; and I have deposited in his hands title-deeds to lands purchased from the devisees of W. T., as a collateral security for the same," is a promissory note transferable by indorsement. *Wise v. Charleton*, 49.

QUO WARRANTO.

1. An information in the nature of a *quo warranto* lies at the instance of a private relator against individuals acting as members of a corporation, although the affidavits on which it is founded go to shew that no such corporation has ever existed. *The King v. White*, 403.

2. In Schedule A., 5 & 6 Will. 4, c. 76, *Sunderland* is mentioned as possessing a public corporation for the re-modelling of which provisions are made by the act. The Court made a rule absolute for an information in the nature of a *quo warranto*, at the instance of a private relator, against a party acting as mayor under those provisions, although the affidavits in support of the rule went to shew that *Sunderland* did not possess a public corporation at the time of passing the act, and therefore that its provisions could not apply. *Id.*

RATE.

See **HIGHWAY**, 1. **MANDAMUS**, 8. **POOR**, 12. **STATUTE**, 2, 3, 4, 5, 6.

1. Churchwardens are only authorized, by 59 Geo. 3, c. 134, to borrow money upon the credit of the church rates, for the purpose of defraying the future expenses of repairs to the church: they have no authority to make a rate for the purpose of enabling them to repay money borrowed to pay the expenses incurred for by-gone repairs. *The King v. The Inhabitants of Dursley*, 9.

2. A person lent money on the credit of the church rates, for the purpose of re-building and enlarging a church under the 59 Geo. 3, c. 134, s. 40, and agreed that the money should not be repaid for twenty years, unless at the option of the churchwardens:—*Held*, that the churchwardens were bound nevertheless to raise annually, under that section, a

sum equal to the amount of the interest, to form a fund for the ultimate re-payment of the principal. *The King v. The Churchwardens of St. Michael's, Pembroke*, 344.

RATE BOOK.—See **OFFICER**, 7.

RECOGNIZANCE.—See **CERTIORARI**, 7, 9. **PRACTICE**, 78.

Recognizances of bail taken under statute 5 & 6 W. & M., c. 11, on the removal of an indictment, cannot be estreated, the defendant having agreed with the prosecutor to plead guilty and submit to a nominal fine, without the knowledge of the bail. *The King v. Rogers*, 124.

RENDER OF PRISONER.

See **PRACTICE**, 56, 57, 58.

REPLEVIN.—See **SHERIFF**, 2, 3, 4.

Where a landlord seizes goods as a distress for rent, and after the distress payment of the rent is tendered but refused, the tenant may maintain replevin in respect of the unlawful detainer. *Evans v. Elliott*, 231.

RESTRAINT OF TRADE.

1. An agreement was made by a person, on entering into the service of a chemist, as his assistant, not to carry on the trade of a chemist in the same town as his master did, nor within three miles of it. The operation of the agreement was not limited to the life of the master, nor to the time that he should carry on his business, nor to any term of years; and therefore extended to the life of the assistant:—*Held*, that the agreement was not on that account illegal, as being in restraint of trade. *Hitchcock v. Coker* (in Error), 464.

2. There must be a good and valuable consideration for such an agreement; but the Court will not examine whether the consideration is equal in value to what is given up. *Id.*

ROADS.—See **HIGHWAY**.

RULES OF COURT.

1. Rules as to the admission and examination of attorneys, E. T. 6 W. 4, 1836, 1.
2. Rules on sheriff, M. T. 7 Will. 4, 1836. 289.

Rules of Court on which Decisions are reported.

T. 31 Geo. 3. Attorney. *Ex parte Ridley*, 66.
T. 1 Will. 4, s. 1. Notice of bail. *Pierce's bail*, 290. *Holling's bail*, 290.
T. 1 Will. 4, s. 3. Affidavit of justification. *Rout's bail*, 291.
T. 1 Will. 4, s. 7. Notice to plead. *Fenton v. Anstice*, 125.
T. 1 Will. 4, s. 12. Taxing costs. *Lloyd v. Kent*, 130.
H. 2 Will. 4, l. 5. Affidavit. *Brown's bail*, 291.
H. 2 Will. 4, l. 8. Affidavit of debt. *Smith v. Heap*, 89.
H. 2 Will. 4, l. 17. Justifying bail. *Barratt v. James*, 128.
H. 2 Will. 4, l. 33. Irregularity. *Golding v. Scarborough*, 94.
H. 2 Will. 4, l. 64. Costs. *Pearcock v. Harris*, 456.
H. 2 Will. 4, l. 70. Judgment as in case of non-suit. *Robinson v. Taylor*, 304.
H. 2 Will. 4, l. 72. Cognovit. *Kirke v. Dark*, 94.

- H. 2 W. 4, I. 85. Charging in execution. *Colbron v. Hall*, 316.
 H. 2 Will. 4, V. Attachment. *The King v. The Sheriff of Shropshire*, 319.
 H. 4 Will. 4, 7. Demurrer books. *Somers v. Miller*, 117.
 H. 4 Will. 4, 17. Notice of taxing costs. *Lloyd v. Kent*, 130.
 H. 4 Will. 4, s. 1. Declaration. *Newnham v. Hannu*, 303.
 H. 4 Will. 4, s. 3. Relation of judgments. *Colbron v. Hall*, 316.
 H. 4 Will. 4, s. 5. Pleading. *Bastard v. Smith*, 428. *Serjeant v. Chafey*, 273.
 H. 4 Will. 4. Pleading, assumpsit. *Hayselden v. Staff*, 204. *Shearwood v. Hay*, 249. *Willis v. Langriage*, 250.
 H. 4 Will. 4. Pleading, debt. *Jones v. Reade*, 382.
 H. 4 Will. 4. Pleading, case. *Lillie v. Price*, 381.
 H. 4 Will. 4. Taxing costs. *Masters v. Tickler*, 81.
 H. 6 Will. 4. Admission of attorney. *Anon.* 65. *Ex parte Ridley*, 66.

SCIRE FACIAS.

In *scire facias*, a plea that a writ of error has been sued out and was still pending, and that the judgment had not been affirmed or reversed, is bad, as not being an answer to the action. *Snook v. Maddox*, 188.

SCOTLAND, LAW OF.—See PLEADING, 26.

SESSIONS.—See POOR. INCLOSURE, 3.

1. The application by the overseers against the father of a bastard, must be at the next practicable sessions after the child first becomes chargeable. *The King v. The Justices of Oxfordshire*, 110.

2. It is a question for the justices what circumstances shall entitle the overseers to make the application at a subsequent sessions. *Id.*

3. In order to make an application at a subsequent sessions, it is not necessary to enter and respite at the first sessions. *Id.*

4. Where a bastard child becomes chargeable to the parish, the overseers ought to apply, under the 4 & 5 Will. 4, c. 76, s. 72, to the next General Quarter Sessions of the Peace, for an order on the putative father; or, at all events, if the application is deferred to a subsequent sessions, the overseers must shew that they made diligent inquiry to discover the father, and that they did not discover him in time to give him, before the next sessions, under the 73d section of the statute, fourteen days' notice of the intended application. *Rex v. Heath*, 143.

5. *Semble*, that in such a case the overseers should make the application to the sessions, and get the order for the hearing respited. *Id.*

6. Where a statute gives a party the right of appealing to the sessions, on notice being given, that Court must not impose on him any new condition of appeal not imposed by statute. *The King v. The Justices of Staffordshire*, 48.

7. On an appeal to the sessions against a church-rate, under 53 Geo. 3, c. 127, s. 7, notice of the appeal was given to one only of the two magistrates who had acted together in making the order appealed

against:—*Held*, that the sessions were wrong in refusing to hear an appeal on that ground. *Id.*

8. A party was convicted before two magistrates under the 17 Geo. 3, c. 56, and gave notice of appeal, but did not enter into recognizances to prosecute the appeal and abide the judgment, and was therefore committed for want of entering into such recognizances. When the sessions arrived, he did not proceed with the appeal, and the prosecutor did not move to affirm the conviction. At the end of the sessions he was discharged, the commitment, for want of entering into the required recognizances, being then satisfied: *Held*, that this Court would not grant a mandamus to the convicting magistrates to issue their warrant against the defendant upon the conviction, it being at best doubtful whether, under these circumstances, their jurisdiction was not altogether at an end. *The King v. The Justices of Middlesex*, 222.

9. It seems that when the defendant did not proceed with the appeal, the prosecutor ought to have moved the sessions to affirm the conviction. *Id.*

10. If the Court of Quarter Sessions sends up a case for the opinion of the Court of K. B., and desire to have their order confirmed or quashed, according as the Court shall think their construction of a written instrument right or wrong, but omit to set out sufficient to shew whether their order is on the whole correct or not, the Court of K. B. will nevertheless confirm or quash the order, as they think the construction right or wrong. *The King v. The Inhabitants of Billingham*, 419.

11. A case sent by the sessions for the opinion of the Court of K. B., stated, that at the hearing of an appeal touching the settlement of a pauper, it was proposed to give in evidence conversations between the parties to a written agreement, but did not state what those conversations were; also that it was proposed to give in evidence an indorsement upon the agreement, but that it was not proved that the indorsement was in existence when the agreement was signed. The question stated for the opinion of the Court was the construction of the agreement. The Court refused to send the case to be restated. *Id.*

SETTLEMENT.—See POOR.

SEWERS.

Where a collector for the Commissioners of Sewers receives from them a warrant directing him to distrain and afterwards sell the goods of A., he cannot, if he distrain the goods of A.'s tenant, justify the distress on the ground of his general authority of collector. Whatever that general authority may be, it is taken away in the particular case by the warrant directing him to do a specific thing. *Sabourin v. Neale*, 103.

SEXTON.—See MANDAMUS, 5, 6, 7.

SHERIFF.

See ATTORNEY, 15. PRACTICE, IV, 79, 81. RULES OF COURT, 2.

1. If a sheriff applies for relief under the Interpleader Act, and on hearing the case his rule is discharged, he has afterwards a reasonable time to make his return; and therefore an attachment obtained against him the same day for not making a return, is irregular. *The King v. The Sheriff of Hertfordshire*, 122.

2. A replevin clerk is bound to make reasonable and cautious inquiry into the apparent responsibility of persons who, being unknown to him, tender themselves to him as replevin sureties. *Jeffery v. Bastard*, 60.

3. It is not sufficient to take the statements of the parties themselves, the replevin clerk must inquire from other persons. *Id.*

4. *Semble*, that he is not bound to travel out of his own office for the purpose of making inquiries, but he may require vouchers to be brought to him. *Id.*

5. A writ of attachment against B. issued from the Court of Chancery at the suit of A. The sheriff attached B. by his body. B. was discharged from custody as privileged from arrest. In an action upon the case by A. against the sheriff for a negligent discharge of his duty, A. must state precisely the nature of the privilege which prevented the ordinary duty of the sheriff from attaching with regard to B., and for want of such statement the declaration will be bad on general demurrer. *Lloyd v. Wood*, 158.

6. *Quere*, whether an action can be maintained at all by A. against the sheriff, under such circumstances. *Id.*

SLANDER.

1. Words spoken by one member of a charitable association to another, respecting the conduct of a medical man employed by the association, are not a privileged communication. *Martin v. Strong*, 336.

2. *Semble*, if they had been spoken at a meeting of the association, held for the consideration of the medical man's conduct, it would be otherwise. *Id.*

SMALL DEBTS ACT.

See PRACTICE, 49. PRISONER.

STAMP.

See LIMITATION OF ACTION, 2. MANDAMUS, 1.

1. The proper stamp for a lease, demising a messuage and lands at a rent ascertained by the instrument, and also certain other lands at the rent then paid for them by A., but not mentioning the amount of that rent, is an ad valorem stamp, calculated upon the whole amount of the rent to be paid for all the lands. *Parry v. Drere*, 395.

2. An attornment where the tenant merely puts one person in the place of another as his landlord, but continues to hold under the same terms and conditions as before, is a mere acknowledgment that the person making it is tenant, and it requires no stamp. *Doe d. Linsey v. Edwards*, 139.

STATUTE.—See COMPENSATION. INCLOSURE. OFFICER, 6. PLEADING, 23.

1. The words "owner or proprietor of land," used in a compensation clause in a local act of parliament, to indicate the persons to whom compensation is to be made for injuries arising out of the prosecution of the act, have not necessarily any technical meaning confined to the owner of the inheritance, but must be construed with reference to the general object of the act, and mean any person who has any estate or interest—as, for instance, a tenant—in the land, who sustains loss or damage. *Lister v. Lobby*, 12.

2. The word "hereditament," when used as a description of property liable to be rated in a statute,

need not necessarily be construed in its larger and legal sense, but when found with other words may be construed with them as a word ejusdem generis. Therefore, where a local act imposed a rate on every person "who should inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, or other building, tenement, or hereditament:" it was held, that the word "hereditament" meant only such as were capable of corporeal enjoyment, and did not extend to make liable to be rated a money payment in lieu of tolls. *Colebrooke v. Tickell*, 23.

3. The burden of proving that a party is liable to be rated, by the operation of a local act of parliament, for property for which he was never before liable to be rated, lies on the party seeking to impose it. *Id.*

4. Per Coleridge, J. The words of a local act of parliament, imposing a charge upon those who were never before liable to it, should be so clear and express, that the Court should be able to see that the persons to be charged have had due warning of the intention to charge them. *Id.*

5. Where an Inclosure Act directs that a corn rent shall be awarded to the rector in lieu of tithes, and that, in making the valuation, "the tithes of all ancient and inclosed lands shall be taken as equal in value to one-fifth part of the net value of the said lands:"—The rector was held to be rateable in respect of the corn rent so awarded to him. *The King v. The Churchwardens of Wistow*, 95.

6. *Semble*, that when the legislature thus speaks of "the tithes" generally, and then of the "net value of the lands as the equivalent for them," it must be presumed to mean that one-fifth of the net annual value of the land is equal to the gross value of the tithes, and the rector is liable to be rated for the payment substituted, as he originally was for the tithes themselves. *Id.*

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8 H. 6, c. 9, Forcible detainer. *The King v. Wilson*, 225.

21 Jac. 1, c. 16, s. 7, Limitation of action. *Piggott v. Rush*, 28.

12 Car. 2, c. 24, ss. 8, 9. Guardian. *The King v. Isley*, 196.

29 Car. 2, c. 3, ss. 1, 2, 4. Parol demise. *Lord Bolton v. Tomlin*, 369.

1 Jac. 2, c. 22, (local). Vestry. *The King v. St. James, Westminster*, 253.

4 & 5 W. & M. c. 20. Docketing a judgment. *Doe d. Barron v. Purchas*, 50.

2 Geo. 2, c. 23, s. 23. Bill of costs. *Pepper v. Yeatman*, 116.

5 Geo. 2, c. 19, s. 2. Recognizance. *The King v. The Inhabitants of Abergele*, 375.

7 Geo. 2, c. 20. Mortgage. *Doe d. Hurst v. Clifton. Doe d. Orchard v. Stubbs*, 285.

13 Geo. 2, c. 18, s. 5. Certiorari. *The King v. The Inhabitants of Abergele*, 375. *The King v. The Justices of Middlesex*, 407.

14 Geo. 2, c. 17. Judgment as in case of a nonsuit. *Ward v. Turner*, 90. *Brough v. Scarby*, 139.

17 Geo. 2, c. 3. Inspection of rate books. *The King v. The Vestrymen of St. Marylebone*, 261.

17 Geo. 2, c. 38. Inspection of rate books. *The King v. The Vestrymen of St. Marylebone*, 261.

22 Geo. 2, c. 46, s. 14. Clerk of the peace. *Faulkner v. Chevell*, 183.

- 23 Geo. 2, c. 33. Court of Requests. *Wills v. Longridge*, 309.
- 13 Geo. 3, c. 78, s. 48. Surveyor of highways. *Harrison v. Round*, 18.
- 17 Geo. 3, c. 56, s. 20. Embezzling silk. *The King v. The Justices of Middlesex*, 222.
- 19 Geo. 3, c. 70, s. 6. Recognizance. *Brady v. Veeres*, 320.
- 35 Geo. 3, c. 101, s. 2. Suspending order of removal. *The King v. The Inhabitants of Oldland*, 4.
- 41 Geo. 3, U. K. c. 109, s. 3. Inclosure. *The King v. Marsh*, 255.
- 43 Geo. 3, c. 46. Vexatious arrest. *Jones v. Jehu*, 119.
- 46 Geo. 3, c. lxxxix, s. 53, (local). Rateability. *Colebrooke v. Tickell*, 23.
- 48 Geo. 3, c. 123. Small Debts Act. *Clay v. Bowler*, 283. *Smith v. Preston*, 93.
- 49 Geo. 3, c. 125, s. 3. Friendly Society. *Day v. King*, 178.
- 51 Geo. 3, c. xxv, s. 46, (local). Inclosure. Estate. *Doe d. Harris v. Saunder*, 350.
- 53 Geo. 3, c. 127, s. 7. Notice of appeal. *The King v. The Justices of Staffordshire*, 48.
- 55 Geo. 3, c. 68. Stopping highway. *The King v. The Inhabitants of Milverton*, 434. Footpath. *The King v. The Justices of Middlesex*, 407.
- 55 Geo. 3, c. 194, s. 21. Apothecary. *Shearwood v. Hay*, 249. *Willis v. Langridge*, 250.
- 56 Geo. 3, c. 139. Parish apprentice. *The King v. Inhabitants of Maidstone*, 198. *The King v. The Inhabitants of Witney*, 150.
- 58 Geo. 3, c. 69, s. 6. Surveyor of highways. *Harrison v. Round*, 18.
- s. 8. Election of churchwarden. *Campbell (clerk) v. Maund*, 457.
- 59 Geo. 3, c. 134, s. 14. Repairs of a church. Rate. *The King v. The Churchwardens of Dursley*, 9.
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- 59 Geo. 3, c. cxviii, (local). Action against commissioners. *Cane v. Chapman*, 355.
- 3 Geo. 4, c. 113. Pension. *The King v. The Lords Commissioners of the Treasury*, 67.
- 3 Geo. 4, c. 126, s. 51. Rate. *The King v. The Trustees of the Great Dover Street Road*, 423.
- s. 85. Inquisition. *The King v. The Trustees of the Norwich and Watton Turnpike Road*, 385.
- 4 Geo. 4, c. 95, s. 31. Rate. *The King v. The Trustees of the Great Dover Street Road*, 423.
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- 5 Geo. 4, c. cxxvi, s. 10, (local). Election of churchwardens. *Campbell (clerk) v. Maund*, (in error), 457.
- 6 Geo. 4, c. 57. Settlement. Tenement. *The King v. Great and Little Usworth and North Biddick*, 100.
- 7 Geo. 4, c. 57, s. 61. Insolvent, new security. *Smith v. Alexander*, 82.
- 7 & 8 Geo. 4, c. 71, s. 6. Recognizance. *Brady v. Veeres*, 320.
- 9 Geo. 4, c. 14, s. 8. Acknowledgment of Debt. *Morris v. Dixon*, 57.
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- 11 Geo. 4 & 1 Will. 4, c. 68. Carrier. *Syms v. Chaplin*, 411.
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- s. 16. Welsh Attornies. *In re Williams*, 294.
- s. 21. Render. *Scaith v. Brown*, 322.
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- 1 & 2 Will. 4, c. 58, s. 1. Interpleader. *Lawrence v. Matthews*, 123.
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- 1 & 2 Will. 4, c. 60, s. 32. Inspection of rate books. *The King v. The Vestrymen of St. Marylebone*, 261.
- 2 & 3 Will. 4, c. 39, ss. 1, 4. Capias. *Margetson v. Tugge*, 85. *Wickens v. Parker*, 137.
- 3 & 4 Will. 4, c. 27, s. 15. Limitation of action. *Doe d. Jones v. Williams*, 213. *Doe d. Burgess v. Thompson*, 451.
- 3 & 4 Will. 4, c. 42, s. 1. Pleading the general issue. *Haine v. Davey*, 30.
- s. 23. Amendment. *Serjeant v. Chafey*, 273. *Guest v. Elwes*, 34.
- s. 39. Arbitration. *The King v. Bardell*, 401.
- 3 & 4 Will. 4, c. 52, s. 50. Customs. *The King v. The Commissioners of Customs*, 247.
- s. 108. Customs. *Alcock v. Taylor*, 58.
- 4 & 5 Will. 4, c. 76, s. 72. Order of bastardy. *The King v. The Justices of Oxfordshire*, 110. *The King v. Heath*, 143.
- s. 81. Appeal. *The King v. The Inhabitants of Holbeach*, 414. *The King v. The Inhabitants of Kelvedon*, 415. Notice of appeal. *The King v. The Justices of Cornwall*, 157.
- 5 & 6 Will. 4, c. 59, s. 9. Cruelty to animals. *Hopkins v. Crowe*, 21.
- 5 & 6 Will. 4, c. 76. Municipal Corporation. *The King v. White*, 403. *The King v. The Mayor and Assessors of Hythe*, 455. *The King v. Chitty*, 399. *The King v. Williams*, 275.
- 5 & 6 Will. 4, c. xxvi, (local). Construction of Road Act. *Lister v. Lobley*, 12.

STATUTE OF FRAUDS.

1. Two parties entered into a written agreement, by which one was to take a farm of the other, and to take the straw, chaff, &c. at a valuation to be made by such competent persons as the two parties should respectively appoint. Such agreement is entire—the two parts cannot be separated from each other; and if one person only is, by parol agreement, afterwards appointed to make the valuation, the landlord cannot maintain an action upon the parol agreement thus substituted, even though the straw and chaff, &c. have been taken and used by the tenant. *Harvey v. Graham*, 146.

2. The defendant's testator agreed by parol with the plaintiff's steward to hire some land from year to year, upon the special terms mentioned in some printed rules, and to commence occupation at a future day; the plaintiff's attorney then signed a memorandum of the hiring at the back of the printed rules:—*Held*, that after a tenancy was actually created by entry and payment of rent, that this copy of the printed rules, and the memorandum indorsed, might be

read by the attorney who signed it, in order to refresh his memory as to the special terms under which the land was hired, although there might perhaps have been, in the first instance, merely an agreement for a lease, which was not to be performed within a year, and was therefore bad by the fourth section of the Statute of Frauds. *Lord Bolton v. Tomlin*, 369.

3. A parol lease for a term not exceeding three years, warranted by the second section of the Statute of Frauds, may be as special in its terms as a written one: *Id.*

SURGEON.—See **PLEADING**, 4, 5.

TITHES.—See **STATUTES**, 5, 6.

TRESPASS.

See **JUSTICES OF THE PEACE. WARRANT OF JUSTICES.**

A person who is not the owner of an animal cannot, under 5 & 6 Will. 4, c. 59, s. 9, direct a police officer to take into custody a person who has ill-treated it, unless such person saw the ill-treatment inflicted. In such a case the bona fides of the intention of the person giving the charge affords him no protection under the statute in an action of trespass. *Hopkins v. Crowe*, 21.

TROVER.—See **OVERSEER**, 1.

A barn of wood, and thatched, was erected by a tenant on staddles, or blocks of stone with caps, some of which stood on the surface of the soil, some a few inches in the ground, and others on a foundation of brick and mortar, rendered necessary by the unevenness of the ground. The whole of the timber-work rested entirely on the staddles by its weight alone, and could be removed without removing the caps which were affixed to the staddles by mortar:—*Held*, that the wood-work and thatch of such a barn was not affixed to the freehold, but was a chattel, for which trover might be maintained. *Wandsborough v. Maton*, 37.

TURNPIKE ROAD.—See **HIGHWAY**.

VESTRY.—See **OFFICER. OVERSEER**, 2.

WARRANT OF JUSTICES.

1. Persons applying under a statute for a warrant to enforce payment of rent for gas supplied, and who by themselves or their officer afterwards execute it, cannot set up the warrant as their justification in an action brought against them by the party whose goods have been seized under it. *Painter v. The Liverpool Oil Gas Company*, 233.

2. It seems that the warrant ought to state the demand of the rent, and the summons and hearing on which the conviction proceeded. *Id.*

WARRANT OF ATTORNEY.

See **INSOLVENT. PRACTICE**, 39.

Judgment entered up on an old warrant of attorney, on an affidavit that the defendant had been seen alive eight months previously in New South Wales. *Johnson v. Fry*, 292.

WILL.

Testator devised "to the use of my grandson J. G., and his assigns, during the term of his natural life, without impeachment of waste, and immediately after the decease of the said J. G.," to trustees to support contingent remainders, "nevertheless to permit and suffer J. G. and his assigns, during his natural life, to receive the rents, issues, and profits; and immediately after his decease, to the use of the first, second, and every other son of the said J. G., severally and successively in remainder, one after another, according to the priority of their respective births, and the heirs male of the body of such son, so that every elder of the same sons, and the heirs male of his body, shall always be preferred to every younger of the same sons and the heirs male of his body." By a codicil, he devised all his freehold, copyhold, and personal estate to his daughter A. M. H. for life, and after the determination of that estate, to his "grandson J. G. and his heirs, in strict entail, as in my said will directed:" and in failure of issue of the said J. G., he ordered that his said estate and effects should go and descend as is by his will directed:—*Held*, that under this will and codicil, J. G. took only an estate for life. *Graves v. Hicks*, 74.

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